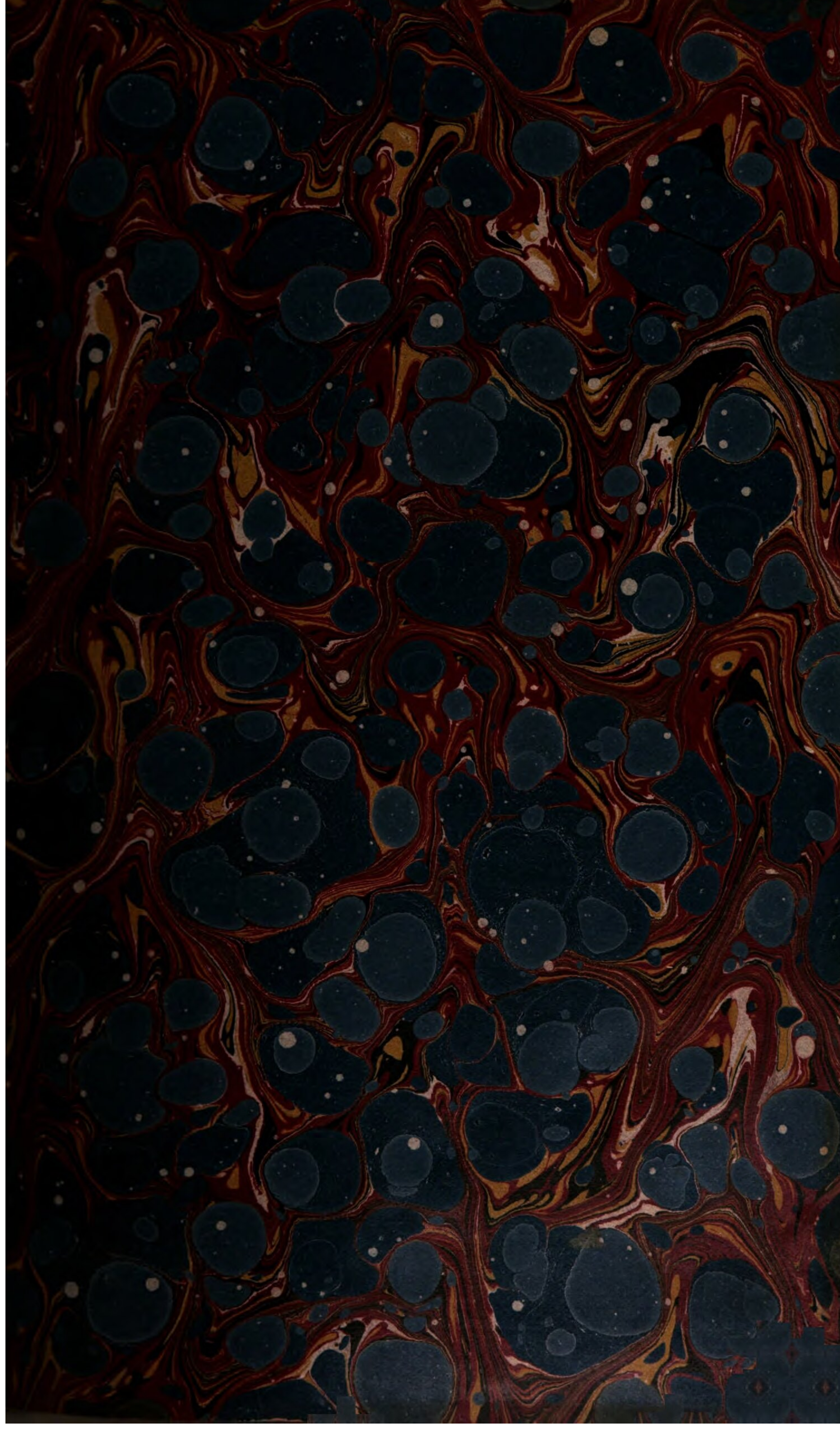




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Grant

The Law

OF

BANKERS AND BANKING

WORKS BY THE EDITOR

THE LAW

AN ANALYTICAL INDEX OF ALL THE ENGLISH CASES
CITED IN THE REPORTS OF THE LORDS OF THE CHANCERY
FROM 1750 TO 1850. IN TWO VOLUMES. VOL. I.
LONDON: PUBLISHED BY J. W. PATERSON, 15, ABchurch Lane, E.C. 4.
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The Law

RELATING TO

BANKERS AND BANKING.

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I.

AN ANALYTICAL DIGEST of all the REPORTED CASES determined in the House of Lords, the Superior Courts of Common Law, and in Bankruptcy; together with a Selection from the Decisions in the Privy Council and Courts of Chancery, and References to the Statutes and Rules of Court, from Easter Term, 1843, to Michaelmas Term, 1855. By R. A. FISHER, Esq., of the Middle Temple, Barrister at Law. 1855. In two Vols., royal 8vo., price £3: 13s. 6d.

[This Work has been out of print for the last four years.]

II.

A DIGEST of all the REPORTED DECISIONS in the House of Lords, Privy Council, Common Law, Equity, Divorce, Probate, Admiralty, Bankruptcy and Ecclesiastical Courts, with a Selection from the Irish Common Law and Chancery Reports, References to the Statutes passed, and Rules and Orders of Court promulgated; and a Collection of Cases overruled and impeached; with Notes, from Hilary Term, 1864, to Hilary Vacation, 1865 [*recently published*]. By R. A. FISHER, Esq., of the Middle Temple, Barrister at Law. Price 12s.

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A TREATISE

ON

The Law

RELATING TO

BANKERS AND BANKING.

BY

JAMES GRANT, M.A.,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

SECOND EDITION.

BY

R. A. FISHER, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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PREFACE

TO THE

SECOND EDITION.



IN preparing this edition, the Editor has been actuated by a desire to render it as acceptable as possible to the classes for whose use the original work was designed, and has spared no pains to accomplish that object.

In consequence of the important alterations affecting Banks and Bankers introduced by Law, and the expansion of banking operations produced by commerce, since the first appearance of this work, the Editor has found himself obliged to re-construct and re-arrange portions of it, and to add several chapters.

The Bill of the Chancellor of the Exchequer for removing restrictions on the issue of Bank notes, as amended in Committee, together with the Reasons

on which it was founded, and also the last official Returns of all the Banks in the United Kingdom, as being likely to be of practical utility, are inserted in the Appendix.

R. A. FISHER.

3, ESSEX COURT, TEMPLE,
5th April, 1865.

PREFACE

TO THE

FIRST EDITION.

THESE pages are the result of an endeavour to compile the Law relating to the business of Banking, as gathered as well from Statutes as from the decisions at Common Law, in Equity and in Bankruptcy. A work on such a plan, if properly executed, seems to be wanting, and the Author trusts that his attempt to supply the void will not prove wholly unacceptable to the class of persons for whose use it is principally designed—the professional advisers of the great Banking interests of this country. The first duty, it is conceived, of any one who deals with a subject of so great importance, and such general interest, is to aim solely and entirely, to the exclusion of all other purposes, at practical utility; accordingly from his book the Author has carefully excluded all ambitious attempts at scientific disquisition: the endeavour has been not to speculate how the Law might be improved, not to lay down what it ought to be, but what it is; so that every one, whether concerned for a person carrying on the business of Banking solely, or in a Common Law partnership, whether a shareholder or a director in a Banking Copartnership, under Statute 7 Geo. IV. c. 46, or in a Joint Stock Company under Statute 7 & 8 Vict. c. 113, might find here the Law, so far as it has hitherto been prescribed by statutory enactment, or developed, ascertained and explained by judicial decisions,

clearly, accurately and usefully stated. In this view the plan has been followed of placing before the reader not merely statements of the dry points of Law, which were decided in the cases collected ; but, as a rule, a summary of the principal facts, and occasionally of the arguments urged before the Court, together with the main grounds on which the judgment proceeded, are also presented. By these means, and by the endeavour to lay down no position or principle unaccompanied by examples to illustrate its application and effect, it has been hoped to provide facilities, in a compendious form, for the solution of every question that can arise, provided such question, in its nature, falls within any of the classes of questions which have already passed into *res judicatæ*. By these means, at any rate, it may be hoped that a person who consults this Work, in order to know what are his rights or liabilities, and what the proper course of conduct in any given set of circumstances, will be enabled readily to observe and to decide whether the principles and rules stated under the head to which his difficulty belongs have been applied to, or deduced from, circumstances the same as, or analogous to, those of his particular case, and whether the reasons assigned by the Court meet the difficulty and govern the case.

In order to render the Treatise more widely available for every-day reference, the rules, suggestions, cautions, &c. for the conduct of Bankers, which the Author has thought it desirable to interpose, while they have been immediately derived, in all cases, from the observations of the Judges in Law and in Equity, have been—as it is hoped will be found—as much as possible expressed in the language of business, divested of legal technicalities, and adapted for the probable requirements of practical men.

It may be objected that the plan of this Work is incomplete for not treating, separately and specifically, the subject of the Law relating to the Bank of England. The answer is, that Law is spread over several hundreds of statutes—the

titles alone of these statutes fill about 200 pages of the Statute Book;—an adequate statement of it would have occupied, even in a condensed form, a space sufficient to have probably doubled, at the lowest estimate that could be formed, the bulk of this volume; while the whole of that additional matter would have been found quite useless for the general purposes of those for whom the Work is designed, being only serviceable to such persons as might wish to ascertain the relations of the Bank of England to the Government, in respect of the management and other details concerning the National Debt, Loans, &c. Now, on these subjects it would be impracticable to present the Law in a shape at once compendious and useful; every one with experience in such matters knows, that in practice no result that is satisfactory can be had, except by recourse to the words of the Statutes themselves, viewed in connexion as a whole. For these reasons, it has been decided not to attempt dealing with this branch of the Law relating to the Bank of England; what has been attempted on this head is to present a full view of the Law, whether contained in statutory enactments or judicial decisions—in the first case in the very language of Parliament—as it relates to the monopoly of the Bank of England, in its bearings upon the rights and liabilities of the Banking interests throughout the country, together with all such matters connected with Government, and Bank, Stock, &c., and the practice, on various points, of the Bank of England, as Bankers and their customers are entitled to expect, they will find information upon, in a work of this nature.

A Summary View of the Legislation respecting the Bank of England and its monopoly is not without its interest, and will be found sufficiently useful as an introduction to many of the subjects treated in the following pages to justify insertion here.

In 1694, Parliament gave power to incorporate a body of persons as the Governor and Company of the Bank of England, who were enabled to purchase and retain lands,

and to alien the same; but the corporation was only to endure until the two-fold condition should be complied with, by the Government, of giving a twelvemonth's notice of dissolution, at any time after the 1st of August, 1705, and repaying the capital borrowed from the Bank. Their existence as a body politic has been prolonged, their original powers and privileges being on most occasions altered, and latterly limited, by successive Statutes down to that of 1844, commonly known as the Bank Charter Act, under which it stands at present liable, according to that Statute, to be put an end to at any time upon twelvemonth's notice being given after the 1st of August, 1855, *and* upon repayment by Parliament to the Bank of the sum of 11,015,100*l.*, the debt then due from the public to the Bank, *and* upon payment to the Bank of all arrears of the sum of 100,000*l. per annum* (the "yearly fund"), *and also* upon repayment of all principal and interest which shall be due to the Bank upon all such Tallies, Exchequer Orders, Exchequer Bills, or Parliamentary Funds, which the Bank shall then have remaining in their hands; such cessation of their existence, powers, &c. to take place at the expiration of the said notice. Any vote or resolution of the House of Commons, signified under the hand of the Speaker in writing, is to be a sufficient notice. Soon after the establishment of the Bank, they obtained an enactment that no other Bank or any corporation, society, fellowship or constitution in the nature of a Bank, should be erected or established, permitted, suffered, countenanced or allowed by Act of Parliament, within this kingdom (*b*). Ten years later was passed the enactment, which, with limitations from time to time, has subsisted to our own day, and which forbade any other body politic erected or to be erected, or any other persons united or to be united in covenants or partnership exceeding six persons, in England, to borrow, owe or take up any money on their Bills or Notes payable on demand, or at any less time than six

(*b*) 8 & 9 Will. & M. c. 20.

months from the borrowing thereof(*c*). In 1742, the privilege was again solemnly recognized by Parliament(*d*), that no other Bank should be erected, established or allowed by Parliament; and that it should not be lawful for any body politic, or for any other persons united in covenants or partnership exceeding six persons, in England, to borrow, owe or take up any money on their Bills or Notes payable on demand or at any less time than six months from the borrowing.

In 1781, this enactment was repeated *verbatim* (*e*), as it was in 1800(*f*). At length, in the year 1826, came a limitation of the Bank's monopoly to London and a district of sixty-five miles round it; by which any body politic, erected for the purposes of banking, and any number of persons united in covenants or partnership, although exceeding the number of six, might carry on business as bankers in England, and make and issue their Bills or Notes at any place or places in England exceeding sixty-five miles from London, made payable on demand, or otherwise, at some place or places specified on the same, and might borrow, owe or take up any money on their Bills or Notes so made and issued at any such place or places as aforesaid, provided they have no house of business, as Bankers, in London, or at any place or places within sixty-five miles from London: and the Bank of England was enabled to erect Branch Banks in any part of England(*g*). In 1833, however, any body politic, and any other persons united in covenants or partnership, though exceeding the number of six, in business as Bankers, were allowed to make Bills or Promissory Notes payable by an agent in London, or to draw on such agent(*h*), payable on demand or otherwise, in London, and

(*c*) 7 Anne, c. 7, s. 61.

(*d*) 15 Geo. 2, c. 13, s. 5.

(*e*) 21 Geo. 3, c. 60, s. 12.

(*f*) 39 & 40 Geo. 3, c. 28, s. 15.

(*g*) 7 Geo. 4, c. 46, s. 1.

(*h*) 3 & 4 Will. 4, c. 83, s. 2.

for any less amount than 50*l.*, which they could not do before. Still, it was, in the same year, enacted, that no body politic or corporate, or society or company, or partnership, exceeding six persons, shall make or issue in London, or within sixty-five miles thereof, any Bill of Exchange or Promissory Note, or engagement for the payment of money on demand, or upon which any holder might obtain payment on demand; but any such body, society, company or partnership, might carry on business within the said limits, provided they did not borrow, owe or take up money on their Bills or Notes payable on demand, or at any less time than six months from the borrowing (*i*); but then as a compensation, Bank of England Notes were made a legal tender anywhere but at the Bank of England or its Branches. In 1844, a new system was introduced (*k*), steps were taken towards getting rid of the Country Bank circulation of Notes, in time, by holding out inducements to Bankers to cease issuing, and by prohibiting Bankers who had once ceased from resuming the issue, and by prohibiting every Banker who was not issuing his own Notes on the 6th of May, 1844, to issue for the future; it was also enacted, that any society or company, or any persons in partnership, though exceeding six, in business as Bankers, in London or within sixty-five miles, may draw, accept or indorse Bills of Exchange not being payable to bearer on demand; and in the same year, the system of Joint Stock Banking Companies was established (*l*), the system of Banking Copartnerships having been set up in 1826. Prior to 1826, nowhere in her Majesty's dominions, at all events nowhere in England, could more than six persons associate together for the purpose of carrying on Banking business (*m*). But there never was, apparently, anything in the nature of legal

(*i*) 3 & 4 Will. 4, c. 98, s. 3.

(*k*) 7 & 8 Vict. c. 32.

(*l*) 7 & 8 Vict. c. 113.

(*m*) *Lord Cranworth*, V.C., 1 Sim. N. S. 234.

restriction to prevent private Banks in London, not having more than six partners, from issuing their own Notes payable to bearer; and the historical fact is, that Goldsmiths' Notes, as private Bank Notes were then called, were issued by private Bankers in London for some years after the Bank of England was established.

With respect to those comparatively new modes of carrying on the business of Banking, the Banking Copartnerships, and Joint Stock Banking Companies, much attention has been paid to place before the reader the law relating to them in as clear a light as possible; the subject of directors' powers and liabilities, civil and criminal, the rights and liabilities, and remedies of Shareholders, as involved on the Bankruptcy or Winding-up of these Bodies, and also generally, it is hoped, will be found explained in as satisfactory a manner as the present state of the Law admits of.

The subject of Colonial Banks has not been omitted, and there is subjoined a Summary View of the Law relating to Savings' Banks.

MIDDLE TEMPLE,

Nov. 18, 1856.

CHAPTER I
OF THE DISCOVERY OF THE CONTINENT
AND THE FIRST SETTLEMENTS

IN the year 1492, Christopher Columbus, an Italian navigator, discovered the continent of America, while seeking a westward passage to the Indies. He landed on the island of San Salvador, in the Bahamas, and named it San Salvador. The first permanent European settlement was founded by Juan Ponce de Leon, a Spanish explorer, in 1493, on the island of San Juan, in Puerto Rico. He named it San Juan, in honor of St. John the Baptist.

The first English settlement was founded by Sir Walter Raleigh, an English explorer, in 1585, on Roanoke Island, in Virginia. He named it Roanoke, in honor of the Roanoke River. The first permanent English settlement was founded by Sir Walter Raleigh, an English explorer, in 1607, on Jamestown, in Virginia. He named it Jamestown, in honor of King James I.

The first French settlement was founded by Samuel de Champlain, a French explorer, in 1608, on Quebec, in Canada. He named it Quebec, in honor of the St. Lawrence River. The first permanent French settlement was founded by Louis de Buade, a French explorer, in 1624, on Montreal, in Canada. He named it Montreal, in honor of St. Mary.

The first Spanish settlement was founded by Juan Ponce de Leon, a Spanish explorer, in 1493, on San Juan, in Puerto Rico. He named it San Juan, in honor of St. John the Baptist.

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ERRATA.

From top, line 8, page 557, instead of "*Court*" read "*Crown*."
Page 485, note (a), line 4, instead of "*applied*" read "*apply*."

A TREATISE
ON
The Law relating to Bankers.

CHAPTER I.

RELATION BETWEEN BANKER AND CUSTOMER.

THE ordinary relation between banker and customer is this: the customer opens an account with the banker by paying a sum of money into the bank, the banker undertaking to hold himself liable for the payment of a like sum to the customer's use, either paying interest on the money or not, as the course of business of the bank or the special arrangements between the banker and the individual customer may be, and also agreeing to honour or cash any cheques, or orders for the payment of any sums of money, which the customer may send to him, during business hours, to the extent of the sum deposited.

A less ordinary, but still a not uncommon, relation between banker and customer is, that the banker makes advances to the customer or allows him to overdraw his account, charging interest on the advances, and in most cases requiring a deposit of securities, or obtaining the guarantee of some third person, for the repayment of such advances, with interest; and whilst such accommodation continues the former relation of the parties is of course inverted.

But neither of these relations partakes of a fiduciary

character, nor bears analogy to the relation between principal and factor or agent, who is a *quasi* trustee for the principal with respect to the particular matter for which he was appointed factor or agent.

Money paid into a bank ceases altogether to be the money of the person paying it in; it is the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it (*a*). To all intents it is the money of the banker to do as he pleases with; though it is true that, in a popular sense, it is spoken of as "my money at my banker's;" "my balance at my banker's;" and though no one can doubt that in ordinary language "ready money" includes the speaker's balance at his banker's. Accordingly, many decisions have been made construing phrases occurring in wills, of this description, to carry sums standing in a banker's books, to the credit of the testator.

This, looking at all the terms of a will, has been held to be the extent of a bequest of "all my ready money" (*b*).

So under the words "ready money," a sum in a savings bank was held to pass in a will (*c*). "To my wife all my ready money at my banker's, in my dwelling-house or elsewhere," &c., pass cash balances in the hands of the testator's banker, and of his agent (*d*).

But money in the hands of his salesmaster in Smithfield does not pass under "all his ready money and securities for money," there being no evidence that the salesmaster acted as the testator's banker (*e*).

Money at a banker's, placed to the trade account of a trader, has been construed to pass in his will under "all my stock in trade" (*f*).

(*a*) *Foley v. Hill*, 2 H. L. Cas. 36.

(*b*) *Parker v. Marchant*, 1 Ph. 356.

(*c*) *In re Powell*, Johns. 49; 5 Jur., N. S. 331.

(*d*) *Fryer v. Ranken*, 11 Sim. 55.

(*e*) *Smith v. Butler*, 3 J. & L. 565.

(*f*) *Stuart v. Earl of Bute*, 3 Ves. 217.

Or the balance in a testator's favour at his bankers may be included under the expression "all my debts," and pass accordingly (g).

Or the balance at a banker's may pass as "money in hand" (h).

So the balances at a testator's banker's upon a current account, and also upon a deposit account, where deposit notes or vouchers were given by the banker as a security for the money, the balance carrying interest and considered as money at the disposal of the depositor, and as readily accessible by him as money in an ordinary account current, were both held to pass under "all my monies" (i).

Effects consisting partly of cash and partly of money, held by a banker on deposit notes, pass by a bequest of all the residue of a testator's monies (j).

But still the legal relation of banker and customer, in their ordinary dealings in money, is purely and simply that of debtor and creditor respectively. Money paid into a banker's is merely a common law debt, and cannot be got out again by means of a bill in equity, there being nothing of a fiduciary character in the connexion between the parties (k).

And it seems that the Statute of Limitations runs against this debt as against any other simple contract debt, and consequently bankers, with whom money has been deposited, may insist, if there has never been any payment into the account subsequently to the first deposit, and no settlement with the customer, that they had never promised

(g) *Carr v. Carr*, 1 Mer. 541, n.

(h) *Vaisey v. Reynolds*, 5 Russ. 12.

(i) *Manning v. Purchell*, 2 Sm. & G. 292; affirmed on appeal, 7 De G., Mac. & G. 55.

(j) *Langdale v. Whitfield*, 4 Kay & J. 426; 27 L. J., Chanc. 795.

(k) *Foley v. Hill*, 2 H. L. Cas. 39, 42, 45. A banker as a witness is bound to answer what the balance of a party to a cause was on a given day, as the knowledge does not come to him in the nature of a confidential or privileged communication. *Loyd v. Freshfield*, 2 Car. & P. 325. But a banker who discloses his customer's account to his creditor is guilty of a breach of duty. *Foster v. Bank of London*, 3 F. & F. 214.

to pay the balance within six years, and this would be a good defence at law (*l*).

If bankers were trustees of money of their customers in their hands this must follow, that notice to them of the drawer having assigned to the payee of a cheque an interest in so much of the drawer's money would, *of itself*, bind the bankers to pay to the payee or bearer, and give the payee or bearer, on non-payment, a right of suit in equity or of an action at law against the bankers (*m*). But *the law* is not so; for it has been expressly decided that money deposited with bankers to be paid to a third person is not money had and received to the use of that person until the bankers have bound themselves to pay it over (*n*). The debt until then remains between them and the customer; so that in case of non-payment to his order the customer is the proper party to sue, and, as will be seen, may recover substantial damages for the injury, always assuming that his account at the time shows a sufficient balance in his favour. The customer has also the right of ordering the banker to carry his balance, or any part of it, to any other account kept with the banker by any other person, and this may be effectually done either by a cheque or an order in writing or orally, though a formal mode is usually adopted (*o*). It is of the nature and essence of the transactions between banker and customer that the latter, having a balance in his favour, shall be able to command payment at sight (*p*).

But although there is nothing in this ordinary relation to constitute the banker a trustee, he may, of course, by

(*l*) *Pott v. Clegg*, 16 M. & W. 321, see *Bridgman v. Gill*, 24 Beav. 302. It is no breach of contract to pay interest on money deposited, that the banker had not regularly entered the interest in his books, the money having been suffered to lie in his hands for eight years. *Foley v. Hill*, 2 H. L. Cas. 40. The usage of bankers by which they charge interest on advances to customers has been expressly sanctioned by the Courts. *Gwyn v. Godley*, 4 Taunt. 346; *King v. Bradley*, 5 Price, 536; *Crosskill v. Bower*, 32 Beav. 86.

(*m*) *Dearle v. Hall*, 3 Russ. 1.

(*n*) *Malcolm v. Scott*, 5 Exch. 610.

(*o*) *Watts v. Christie*, 11 Beav. 551.

(*p*) 11 Beav. 546.

agreement, take upon himself the character of an agent, or make himself a trustee towards a *cestui que trust*; for example, if a customer deposits exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of them, and to credit the customer's account with the proceeds of the sale, in this case it is obvious he is in the position of a trustee, and partly, at least, sustains a fiduciary character; but this service may or may not be appended to his employment of banker; his trade of banker is totally independent of it; his trade of banker consists of the general trade, to which the other is an accidental addition (*q*).

Where three trustees, two of whom were bankers, were empowered by a creditors' deed to carry on the business of the debtor, and to borrow money "from any bankers or other persons" for that purpose, and the bankers made advances of money to the trust at compound interest, the Court however held that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances (*r*).

So when a banker receives money to invest in stocks, or receives orders to appropriate the customer's balance, or a specified part of it, to any specific purpose, and assents, or does not repudiate the orders, he is in the situation of a trustee or an agent with reference to that money.

But it is not part of the business of bankers to invest money generally for their customers (*s*).

Where bankers take a mortgage security from their customer, for a fixed sum owing to them by the latter, the relation of banker and customer ceases thenceforth as to that sum, and it cannot be included in the customer's current account, so as to entitle the bankers to charge compound interest thereon; and in reference to the sum

(*q*) *Per* Lord Brougham in *Foley v. Hill*, 2 H. L. Cas. 44.

(*r*) *Crosskill v. Bower*, 32 Beav. 86; 32 L. J., Chanc. 540.

(*s*) *Bishop v. Countess of Jersey*, 2 Drew. 143; 23 L. J., Chanc. 483; 2 Eq. Rep. 545.

so secured, the mutual rights and obligations are thenceforth those of mortgagees and mortgagor (*t*).

As the right of the customer is to draw out the whole of the sum he deposits with the banker at any time when he shall so please, the acceptance by the banker of a bill drawn upon him by his customer against the amount of the balance in his favour, and made payable at a distant day, is in effect a borrowing of the sum until that day by the banker; for the customer, by drawing the bill, consents that that which is payable immediately shall not be payable until the maturity of the bill (*u*).

It is the duty of a banker in no way to disclose the state of his customer's account. This duty arises from the simple relation of banker and customer. When a cheque is therefore presented for payment, and there are not sufficient assets of the drawer's in the banker's hands, he cannot say to the holder "not enough to meet it by such a sum," and so enable the holder to pay in the deficiency to the drawer's account, and obtain payment of the cheque. A banker is not justified when such is the case in going further than saying "not sufficient assets" (*v*), or, what is more usual, "apply to the drawer."

Some bankers open what is called a deposit account with any customer who desires to deal in that manner; (that is to say), the customer deposits a sum, on which the banker pays interest as may be agreed, and which may be entirely withdrawn at any time by the customer, without notice, on presenting the receipt with his name endorsed on it, when the principal, with interest upon it to the day of repayment, is handed to him (*w*).

Bankers, as we have said, are bound to obey the orders of their customers within the usual course of business; if they disobey them they are responsible both for the delay and any consequence which directly follows the delay.

(*t*) *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Chanc. 756.

(*u*) *Bank of England v. Anderson*, 4 Scott, 118; 3 Bing. N. C. 663.

(*v*) *Foster v. Bank of London*, 3 F. & F. 214.

(*w*) *Thompson v. Bell*, 10 Exch. 11.

Thus a house in America employs an agent in Birmingham to purchase and ship to them certain goods : on account of which they send to him a bill drawn by one A. in America on B. in London, but without endorsing it. The agent directs his bankers to obtain B.'s acceptance of it; B. refuses to accept; of which, however, the bankers omit to give any notice until the bill is due, when they again present it and it is dishonoured. Before the bill arrived in this country A. had become bankrupt, never having had any funds in the hands of B. Then here is a damage done to the agent, but to what amount? Not to the whole amount of the bill, because of the circumstance that the house in America, not having endorsed, was not entitled to notice of dishonour of the bill, and still remained liable to him for the price of the goods he had sent out to them; also the drawer was not entitled to notice, because he had no funds in the hands of the drawee; therefore all that the agent was entitled to recover, as the circumstances of the case stood, was the damage he had sustained by reason of his having been delayed in prosecuting his remedy against the drawer (*x*).

In ordinary circumstances it is obvious the bankers might have become liable for the whole amount of the bill, namely, if the American house had endorsed, and the bill had been drawn against effects.

But it is only to their customer that, in the absence of any act of theirs, they are responsible; thus bankers receive bills from a foreign correspondent with directions to pay the amount to the plaintiff; when he applies to them, they refuse; afterwards the amount of the bills comes to their hands. The plaintiff cannot sustain an action against them as for money had and received to his use (*y*).

If, however, the bankers had assented to the order, and

(*x*) *Van Wort v. Woolley*, 3 B. & C. 439.

(*y*) *Williams v. Everett*, 14 East, 582; *Stewart v. Fry*, 7 Taunt. 339; *Wedlake v. Hurley*, 1 C. & J. 83.

informed the plaintiff that they held the money for him, he might, of course, have sued them (z).

However, an order by a customer to his bankers to hold the customer's money at the disposal of A. B., is revocable until actual appropriation or payment of the money accordingly (a), or until a promise by the banker to A. B. to make such payment (b).

We have already stated the duty of a banker to be to conform to the orders of his customer, with respect to the money deposited by the customer, so long as there is in his hands a balance in favour of the customer, and the orders relate to things which it is the usage and practice of the particular bank, or of the bankers in the district, to do for their customers, or which the bank has specially agreed with the customer to do for him. Now, if the bankers perform such orders punctually, they will often be exonerated from loss in cases where it may be difficult, perhaps, to see any other ground for holding them irresponsible except that the customer's orders have been faithfully and fully performed without negligence or delay.

Much more, then, will they be irresponsible if, acting as the agents of other bankers with whom a party has an account, they conform to the orders of that party, though with him they have no account at all.

Thus, where A.'s broker, by his directions, was accustomed to pay dividends into a banker's in London to A.'s credit in account with a bank at Abingdon, where A. resided, and the London bankers had been accustomed to act accordingly, accepting the payments, giving credit to the Abingdon bank and advising them by post, next day; and a certain payment of this kind was made on the 14th of October into the London house by cheque, and they wrote to advise the Abingdon bank in the usual way by the post of the 15th, on the morning of which day the

(z) *Fruhling v. Schroöder*, 2 Bing. N. C. 77.

(a) *Gibson v. Minet*, R. & M. 68; 1 Car. & P. 247; 2 Bing. 7.

(b) *Lilly v. Hays*, 5 A. & E. 548.

Abingdon bank stopped payment and never again opened the bank for business, and on that day the Abingdon bankers were indebted to the London house to a large amount; the London house received notice of the stoppage on the 15th. A. has no claim against the London bank for the payment so made; for the course of business shows that A. and the country bankers agreed that they would account to him for all sums so to be paid into the London house as above, and that the London house had actually carried the money to their credit (c).

Here the ground of decision seems to be, that the London bankers, by conforming to the arrangement by which in effect they undertook to comply with A.'s orders as to any money that might come to their hands purporting to be paid in by his authority and under directions from him as regarded his account with the country bank, of which conformity the course of dealing was evidence conclusive as not being met by counter proof, the London bankers were exonerated from liability to him; but, possibly, if it could have been shown that they had not in fact given credit for the money in account with the Abingdon bank before it was reclaimed by A., the result would have been otherwise (d).

It will be observed that A. was not a customer of the London bank; but in another case, where a person paid money into a London bank, also not being a *customer* of the bank, in order that they might cause it to be paid to him or his order, through their correspondents, bankers in a country town, on a certain day, and they received the money, but did not cause the money to be paid on the day, whereby the party suffered damage, he was apparently considered to have a good cause of action against the London bank, on the ground that the receipt of the money

(c) *Williams v. Deacon*, 4 Exch. 401.

(d) See *Stevens v. Masterman*, cited in 4 Exch. 401, where Lord Abinger, C. B., held *Nisi Prius* that such a payment might be countermanded. See *Atkin v. Barwick*, 1 Stra. 166; *Walker v. Rostron*, 9 M. & W. 411, 421; *Gibson v. Minet*, 2 Bing. 7.

was a good consideration for an undertaking to the above effect, and that they might be sued for the breach of their promise in that respect. Now here the London bankers, it is submitted, must either be considered as gratuitous bailees or as debtors in respect of the money paid in; but if they were the former, then it would have been a breach of their duty if they had not remitted the identical coins or bank notes paid in—a proposition which could hardly be maintained as against bankers; therefore it would seem that the party paying in, though not having a running account with them as a customer, must be considered as a customer *pro hac vice*, and the bankers as debtors to him *pro tanto*, and liable to comply with his orders according to the usual relation of banker and customer (e).

Where A., not filling any peculiar character or capacity, receives money, delivered to him by B., to be carried to a particular place, and there to be paid to a particular person on account of B., and A. takes the money, but afterwards omits to perform these directions, and in answer to B.'s inquiries says that he has lost the money; it was held, that an action for money had and received was maintainable by B. on these facts merely, though it was objected, that he ought to have brought a special action for the negligence (f).

There seems, therefore, to be authority quite sufficient for the position that any one who takes upon him to remit money and receives it, the owner confiding that he will do so, has assumed a trust which he is bound to perform, notwithstanding that he gains nothing by the transaction (g): and certainly it has never been laid down that a banker

(e) *Shillibeer v. Glyn*, 2 M. & W. 143. In this case the declaration had in the first instance alleged the party to be a customer, but the allegation having been traversed it was struck out, and the amended declaration was demurred to. The money was returned to the plaintiff by the bankers, who afterwards compromised the action.

(f) *Barry v. Roberts*, 3 A. & E. 118.

(g) *Wheatley v. Low*, Cro. Jac. 667; *S. C.*, Palm. Rep. 381, cited by Lord Holt, C. J., in *Coggs v. Bernard*, 1 Salk. 26; and *Barry v. Roberts*, 3 A. & E. 118.

stands in such a situation as renders his liability, in such circumstances, less extensive than that of an ordinary person; on the contrary, he may fairly be considered, his business being to deal in money, and to facilitate the transmission of money, to be in a situation or position in which skill is implied, and therefore an omission to use due skill, even on an occasion of a gratuitous employment, is taken as gross negligence (*h*).

With reference to the rights of a third person in such case, we may observe in general, the rule is, money paid into a bankers' to be paid to a third person is not money had and received to *his* use by the bankers until they have bound themselves to pay it over (*i*).

So that, although in general bankers are bound to comply with the orders of their customers, yet they may refuse, and by that means, whatever liability to the customer they incur, they relieve themselves from all responsibility to the person in whose favour the order is made (*j*); or rather such responsibility does not arise before they do something to admit it, as by agreeing to that effect with him.

The proposition has been laid down more than once, that it is part of the duty of a banker to his customer to be acquainted with his customer's handwriting; it has even been said, as we shall see, that he is bound not only to know his customer's handwriting, but also what is not his customer's handwriting; and there seems to be no doubt that it would be in accordance with all the decisions in which the Courts have defined the duties of bankers, to hold that a banker is responsible to his customer (or must bear the loss if any loss arises) for the consequences of his mistakes or oversights in this respect. However, it has been intimated in one case, where a bill of exchange, purporting to bear the endorsement of a customer, but dishonoured, was paid by the banker for the customer's

(*h*) *Per* Lord Loughborough, C. J., in *Shiells v. Blackburne*, 1 H. Bl. 158.

(*i*) *Malcolm v. Scott*, 5 Exch. 610. *Per* Parke, B., 9 M. & W. 414.

(*j*) *Williams v. Everett*, 14 East, 582.

honour, and he afterwards discovered the endorsement to be forged, and gave notice to the holder of the bill the same day on which the payment was made, that the banker might perhaps recover from the holder the money he had paid him (*k*). However this may be, he could not at any rate, according to the above rule, recover from the customer (*l*).

There can be no doubt that a banker who pays a cheque, the name of the drawer of which is forged, cannot take credit for such payment in his account with the drawer. But if the cheque is drawn payable to order, and the payee's name is forged, and the banker pays the holder, without knowledge of the forgery, the banker is protected in making such payment by virtue of the 16 & 17 Vict. c. 59, s. 19, and entitled to charge the drawer therewith (*m*).

The nature of the business of bankers has been laid down, by very high authority, to be part of the law merchant; and it is to be judicially noticed by the Courts (*n*).

(*k*) *Wilkinson v. Johnston*, 3 B. & C. 428, cited in 9 B. & C. 906.

(*l*) *Foster v. Clements*, 2 Camp. 17.

(*m*) *Hare v. Copland*, 13 Ir. Com. Law Rep. 426.

(*n*) *Per* Lord Campbell in *Bank of Australasia v. Breillat*, 6 Moore P. C. 173; 12 Jur. 189; referring to *Brandao v. Barnett*, 12 Cl. & F. 787; 3 C. B. 519.

CHAPTER II.

CHEQUES.

A CHEQUE on a banker, or, as it is sometimes called, a banker's draft, is a written order for the payment of a specified sum of money to a person named, or bearer, or order (*a*). It is directed to the banker, and should be signed by the person who draws it, and, out of whose monies deposited with the banker, it is to be paid on presentment. Its legal effect is, in a great degree, that of an inland bill of exchange drawn on the banker, and payable to the bearer or order on demand; in some respects, however, as will be shown, it differs from such instrument.

The form of a cheque is usually the following:—

London, 3rd July, 1864.

MESSRS. HOLDFAST & Co.—Pay Mr. Abraham Newland or bearer
order
twenty pounds.

£20: 0s. 0d.

JOHN STILES.

No precise form of words is essential; any words that signify not a precatory request, but an order (*b*) to pay a sum of money, will suffice, provided the following points be observed:—

1. *That the paper be directed to the bankers by their proper or usual style and firm.*
2. *That it be dated.*
3. *That it contain the sum to be paid.*
4. *That it be stamped.*
5. *That it be made payable to bearer, or order, on demand.*
6. *That it be signed by the party drawing.*

It seems that a cheque, in any other language than the

(*a*) The most correct definition of a cheque to be found in all the treatises would seem to be that given in Story on Promissory Notes, s. 487, from which the above is taken.

(*b*) See *Little v. Slackford*, M. & M. 171.

English, would not be according to the usage of bankers in this country, and therefore a banker might legally refuse to cash such a cheque if he had any doubt as to the genuineness of the drawer's signature.

We shall state the reasons for these several requisites in their order, together with the principles and rules that have been laid down respecting them, and such illustrations and examples as appear to conduce to the full comprehension of the subject.

1. *As to the Address.*—A cheque, being in fact an open letter of request, must, it is obvious, to be operative, bear upon it the name of the person who is requested, as well to indicate to the bearer where to present it for payment, as to show the banker who it is that is called upon to cash the order. On the same grounds that a bill of exchange must have an address according to the custom and usage of merchants, a cheque ought to have one (c).

If the bank is carried on under a firm, either the proper and full style of the firm, or the style by which it is usually designated and known, ought to be used.

No person but the person addressed could, after cashing the cheque, have a right to recover from, or have allowed in account with, the drawer, the sum so advanced, which would in fact be in the nature of a gratuitous payment.

2. *As to the Date.*—A cheque may be dated on any day before, or on the day, on which it is issued. A cheque is issued, when it is in the hands of a person entitled to demand cash for it (d). There is no objection to dating a cheque on a Sunday (e), though of course it

(c) Beawes, *Lex Merc.* p. 563, pl. 3, edit. 1813; *Com. Dig. Merchant*, F. 5.

(d) *Ex parte Bignold*, 1 Deac. 735; 2 Mont. & A. 633.

(e) *Begbie v. Levy*, 1 C. & J. 180. In Scotland it has been held to be no objection to a bill of exchange that it was drawn on a Sunday, it being accepted on a week day; but whether a bill of exchange, both *drawn* and *accepted* on a Sunday, would be valid, was left undecided. *Elliott v. Faulke*, 20th Jan. 1844, *Robertson on Bankers' Law*, 2nd edit., p. 24. It has been observed by Alderson, B., in *Watson v. Poulson*, 15 Jur. 1112, that a man who draws a cheque on a Sunday, usually dates it for the Monday.

would not be presentable or payable on that day. But a cheque payable to bearer, if post-dated, that is, if it bears date on a day after that on which it was in fact issued, unless payable to the *maker*, or to some person on his behalf, and sent or delivered to the bankers by the maker, or for him (*f*), is absolutely void (*g*), while a cheque payable to order, if stamped with the duty of a penny imposed by the 16 & 17 Vict. c. 59, is not void by being post-dated (*h*). In the latter case it partakes of the character of a bill of exchange (*i*).

3. *The Cheque must contain the Sum to be paid.*—The relation between a banker and a person who deposits money in his bank being simply that of a debtor to a creditor, to the amount deposited, which, by the usage of bankers, the banker is, at all times, bound to pay out again to the customer upon his cheques under his hand, until the whole, *minus* the banker's commission (where commission is payable), is exhausted, provided the cheques are presented within banking hours: it follows, that the payments cannot be required by the drawer of the cheque to be made, in any other mode, than that in which an ordinary debtor can be required to pay an ordinary debt, that is to say, in English money only. The banker is not a bailee, who is bound to return in specie the coins or other kind of money deposited, upon demand; therefore, although one thousand pounds have been deposited with him in gold, he is not bound to return gold in payment of cheques drawn against it; any cheque which may be presented will be duly honoured by paying it in whatever form a legal tender of payment of a debt, of the particular amount specified in the cheque, may be made.

Formerly a cheque for less than twenty shillings was absolutely void, and the uttering or negotiating such an

(*f*) 23 & 24 Vict. c. 111, s. 17.

(*g*) *Oliver v. Mortimer*, 2 F. & F. 127.

(*h*) *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

(*i*) *Williams v. Jarratt*, 5 B. & Ad. 32.

instrument rendered a person liable to a penalty of 20*l.*, mitigable to 5*l.*; and it was an offence to utter a cheque on which less than twenty shillings remained due, under the 48 Geo. III. c. 88, s. 3. But by the 23 & 24 Vict. c. 111, s. 19, it is expressly provided that notwithstanding anything in any act of parliament contained to the contrary, it shall be lawful for any person to draw upon his banker, who shall *bonâ fide* hold money to or for his use, any draft or order for the payment to the bearer, or to order on demand, of any sum less than 20*s.* (*k*).

Also, for a considerable period an enactment stood on the statute book, which made the drawing of a cheque for any sum under 5*l.* illegal; but this has been altered, and there can be no doubt now (*l*) that a cheque may be drawn for any sum of money which the drawer has in the hands of his bankers.

A cheque must not be expressed in foreign money, as dollars, rupees, francs, rubles, &c., both because it is no part of the banker's *implied* (*m*) contract with his customer, or of his duty of debtor, to pay the debt in any but the known and current money of England; it is no part of his implied contract to insure the customer that he shall always find lying at the bank a sufficient number of the foreign coins to meet the amount specified in the cheque, or to procure them, whatever may be the state of the exchanges, and because it is not according to the law merchant or the usage of bankers, that cheques should be drawn in other terms than in the money of account of England, and because every debt ought to be demanded in a known denomination of money (*n*).

The money of account of England is expressed in pounds,

(*k*) This restriction did not extend to cheques drawn upon a party's own banker in Ireland after the 8 & 9 Vict. c. 37, s. 28, or in a similar case in Scotland, after the 8 & 9 Vict. c. 38, s. 20.

(*l*) 17 & 18 Vict. c. 83, s. 9, repealing 17 Geo. III. c. 30, which created the illegality.

(*m*) Of course such a special contract may be made between a banker and a customer or other person, but the order for such payment would not be, it is conceived, a cheque in law. See Parker, R. 45.

(*n*) *Rastell v. Draper*, Yelv. 80; Moore, 775; Cro. Jac. 88.

shillings, pence and farthings; accordingly £ s. d. is taken in law to mean English money; pounds, shillings, pence; and not foreign money, as *ex. gra.*, livres, sous, deniers (*n*), and the word sterling means current money (*o*).

If the sum in the body of a cheque differs from that in the margin, the sum in the body is the sum which the banker ought to pay (*p*).

Hence, a cheque in the body of which the sum was expressed only in figures, with the letters £ s. d. [thus, £100:10s. 8d.] could not legally be refused payment by a banker having assets in his hands, and such a cheque, purporting to bear date at a place in France, and properly stamped and duly presented, would be valid and binding on all parties for the expressed amount in English money.

But to prevent mistakes, and to render frauds less easy, the form given above, in which the sum is twice stated, once in words, and a second time in figures, with the above letters attached, is the one in general use, and ought always to be adopted. For although the Court would prevent a merely obvious omission or slip from being turned to the prejudice of any one connected with the cheque, as, for instance, if a cheque were drawn for “twenty-five, seventeen shillings and three pence,” it would be held to mean twenty-five pounds sterling, and seventeen shillings and three pence (*q*); yet, in case of a fraudulent alteration of the cheque, if the question which of the two innocent parties, the drawer or the banker, is to bear the loss, arises, it must be answered by resolving the liability to be on that party whose conduct has opened the opportunity for the accomplishment of the fraudulent design; and the loss must rest with one or the other accordingly.

The following instances may be referred to:—

A customer of a banker, on leaving home, entrusted to

(*n*) *Per* Abbott, C. J., *Kearney v. King*, 2 B. & A. 303; and see *Sprowle v. King*, 1 B. & C. 18; *Pierson v. Pounteys*, Yelv. 135.

(*o*) *Wiltshalge v. Davidge*, 1 Leon. 41.

(*p*) *Sanderson v. Piper*, 5 Bing. N. C. 430.

(*q*) *Phipps v. Tanner*, 5 Car. & P. 488.

his wife several blank forms of cheques, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of a line. The figures 52 : 2 were also placed at a considerable distance to the right of the printed £. She gave the cheque thus filled up to her husband's clerk, to get the money. He, before presenting it, inserted the words *three hundred* before the word *fifty*, and the figure 3 between the printed £ and the figures 52 : 2, so that it then appeared to be a cheque for £352 : 2s. It was presented, and the bankers paid it. Held, that the improper mode of filling up the cheque had invited the forgery, and therefore that the loss fell on the customer, and not on the banker (*q*). Perhaps, however, it would not be safe, according to later decisions, to rely on this decision as stating the law, except as applicable in precisely the same, or, at least, very closely analogous circumstances. Thus, if the cheque had been originally filled up for fifty-two pounds two shillings, as well as signed, in the customer's handwriting, the rest of the circumstances remaining the same, it would seem that, as bankers have been held, in general, to be presumed to know their customer's handwriting and what is not his handwriting (*r*), and to be liable, if they pay a cheque that is not genuine, in all other respects, as well as the signature (*r*), they would have been bound to have taken notice that the words *three hundred* were not in the customer's handwriting, and that they ought to have made inquiries before cashing the instrument in those circumstances, and therefore, not having done so, were responsible (*s*).

If a man should lose his cheque book, or neglect to lock his desk in which it is kept, and a servant or a stranger

(*q*) *Young v. Grote*, 4 Bing. 253 ; 12 Moore, 484.

(*r*) See *per* Pollock, C. B., *Bellamy v. Marjoribanks*, 21 L. J., Exch. 73 ; and *per* Bayley, J., *Hall v. Fuller*, 5 B. & C. 750 ; *Coles v. Bank of England*, 10 A. & E. 449 ; *Ex parte Swan*, 7 C. B., N. S. 400 ; 7 H. & N. 603 ; in error, 2 H. & C. 175.

(*s*) *Orr v. Union Bank of Scotland*, 1 Macqueen, H. L. Cas. 513.

should take it out, it is impossible to contend, the judges have said, that a banker paying his forged cheque would be entitled to charge his customer with that payment (*t*).

And where bankers cashed a cheque of a customer which had been altered, but not so as to be obviously perceptible, to a larger sum than the customer drew it for, there it was held to be the conduct of the banker, in not observing the alteration, that gave the means of accomplishing the fraud of the third party, and that, therefore, of the two innocent parties, the banker and the drawer of the cheque, it was on the former that the loss of the overplus beyond what the cheque was really drawn for ought to fall (*u*). And so, where there is no fraud, a corresponding rule holds; the party whose conduct led to the loss must bear it.

As where a cheque has been casually lost out of the possession of a person to whom it had been delivered in payment of a debt, and another person takes it *bonâ fide* for a full consideration, of these two innocent parties the loss must fall upon the former; and the latter, upon being refused payment by the bankers, who had been ordered by the drawer, after the loss, not to pay it, may recover the amount from the drawer (*v*); and the same would be the case if the equities were equal; for *melior est conditio possidentis* (*x*).

4. *That the Cheque be stamped.*—The Stamp Act, 55 Geo. III. c. 184, Schedule, Part 1, exempted from all stamp duties “all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles [altered to fifteen miles by 9 Geo.

(*t*) *Bank of Ireland v. Trustees of Evans's Charities*, 5 H. L. Cas. 410.

(*u*) *Hall v. Fuller*, 5 B. & C. 750.

(*v*) *Grant v. Vaughan*, 3 Burr. 1525, 1526; 3 T. R. 177, 182.

(*x*) *Per Wilmot, J.*, 3 Burr. 1526,

IV. c. 49, s. 15] of the place where such drafts or orders shall be issued : provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued ; and provided the same do not direct the payment to be made by bills or promissory notes."

The penalties imposed by the statute for issuing a cheque in contravention of its provisions, were as follows ; viz., if any person shall make or issue any cheque or draft on a banker, payable to bearer on demand, not duly stamped, and not falling in every respect within the exemptions above specified, the drawer shall forfeit 100*l.* ; any person knowingly taking it, 20*l.* ; the banker knowingly paying it, 100*l.* ; and the banker shall not be allowed it in account against the persons by whom or for whom it was drawn, or against any person claiming under them respectively.

The 16 & 17 Vict. c. 59, which first imposed a penny stamp duty upon drafts or orders for the payment of any sum of money to the bearer, or to order on demand, contained similar exemptions.

But by the 17 & 18 Vict. c. 83, s. 7, every one was forbidden to remit, or send, or receive in payment, a cheque unstamped, to or at a place beyond the distance of fifteen miles in a direct line from the bank at which it was made payable, or in any manner to negotiate or circulate the same, under a penalty of 50*l.* Although by sect. 8, a person receiving an unstamped cheque, issued within the prescribed distance might, by impressing or affixing a penny stamp thereon, negotiate or circulate the cheque at any place beyond.

Since the 24th of May, 1858, however, when the 21 & 22 Vict. c. 20, came into operation, all drafts or orders for the payment of money to the bearer on demand, exempted from stamp duty under the provisions of the 55 Geo. III. c. 184, and 17 & 18 Vict. c. 83, were made chargeable with a duty of one penny. The exemption in favour of cheques payable to bearer consequently ceased.

By the 23 & 24 Vict. c. 15, s. 1, per Schedule, a bill, draft or order upon a banker, though not payable to the bearer or to order, or delivered to the payee, is chargeable with stamp duty, as if the same had been made payable to bearer or to order.

But by the 23 & 24 Vict. c. 111, s. 17, such draft or order, being sent or delivered by the person making or giving the same to the banker, and not to the person, to whom payment is to be made, or to any person on his behalf, is not chargeable with a higher stamp duty than a penny, notwithstanding the payment is thereby directed to be or is made at any time *after the date thereof*. The duty may be denoted by an adhesive stamp.

The 23 & 24 Vict. c. 111, s. 18, also enacts, that where any draft or order drawn upon a banker, chargeable with the stamp duty of a penny (which of course includes as well a cheque payable to bearer as to order), shall come to the hands of the banker unstamped, it shall be lawful for him to affix thereto an adhesive stamp, and to cancel the same; and upon so doing to make the payment thereby directed, and to charge the duty in account against the person who ought to have paid it; or to deduct it from the sum directed to be paid, and such draft or order shall, so far as relates to the stamp duty chargeable thereon, be good and valid, but this shall not relieve any person from liability to the penalty he may have incurred by issuing the draft or order unstamped.

Place of Issue.—It would seem that a cheque may now be drawn at a place beyond fifteen miles from the bank where payable, and need not specify the place where drawn (*y*).

(*y*) The former law and the cases on these points, however, are retained in the following note, as they may be still useful.

Statement of Place and Date of Issue.]—The real place where a cheque was issued ought, in order to have saved stamping, to have been in all cases stated on the face of it. Where an unstamped cheque was dated at Llanelly, but it appeared to have been drawn and issued at a country house called Trimsaran, four miles from Llanelly, the Court held it to be void and inadmissible in evidence. *Waters v. Brogden*, 1 Y. & J. 462.

. . .

Post Dating.—With respect to post-dating cheques, excepting cheques presented to his own bankers by the drawer, or his clerk, or servant, as already pointed out, the law as to the invalidity of a post-dated cheque payable to

So, where a cheque was given and dated at Frome, and drawn on London bankers, Lord Ellenborough said, "The cheque was void in its creation." It is a mere blank. I have not legal optics to see its existence." *Borrodaile v. Middleton*, 2 Camp. 55.

Where the date was—"Dorchester Old Bank; established 1786," which words were in print, and there was no day of the month and year written on the cheque, as the time at which it was issued, and the cheque was unstamped, and the objection was taken that the instrument was void on that account, because the place of issuing was not sufficiently specified, the Court decided that the above date sufficiently showed that the cheque was issued at Dorchester (which was the case) as it had that word upon its face, and that the other words did not hurt. *Strickland v. Mansfield*, 8 Q. B. 675.

Where a cheque, being drawn by the finance committee of a railway company, was headed with the statutory name of the railway company, but was not dated as drawn at any place, it was held to bear no sufficient indication of the place at which it was drawn to satisfy the 55 Geo. III. c. 184, s. 13, and therefore, being unstamped, to be void. *Lord Ward v. Oxford Railway Company*, 2 De G., Mac. & G. 750.

A cheque drawn in this form:—*October 12th, 1847.*—MESSRS. KNAPP & Co., Bankers, Abingdon. Pay to Mr. Hicks, or bearer, one hundred and seventeen pounds, seventeen shillings.

£117 : 17s. 0d.

THOMAS SHARPS.

was considered not to show sufficiently the place where the same was issued, to satisfy the exemption in the 9 Geo. IV. c. 49, s. 15, so that, being unstamped, it was inadmissible in evidence. *Bohart v. Hicks*, 3 Exch. 1.

The delivery of a cheque, without the place at which it was drawn being stated on it, did not amount to payment, unless stamped; and therefore, where the vendor of land had taken such a cheque on account of the purchase-money, but had not had cash for it at the bankers before they stopped payment, he was held in equity to have a lien on the estate for the same. *Bond v. Warden*, 1 Collyer, 583.

Issued beyond the limit of fifteen miles unstamped.—Whenever a cheque was issued fifteen miles or upwards from the banker's place of business it must have been stamped.

It must also have been stamped although issued within the fifteen miles, unless all the three provisoes mentioned in the 55 Geo. III. c. 184, and 9 Geo. IV. c. 49, s. 15, were observed; that is, unless it bore the name of the place where it was issued, and the date of a day on or before the day on which it was issued, and did not direct the payment of the sum mentioned in it to be made in bills or promissory notes.

However, it has been decided that an unstamped cheque drawn beyond the legal limit, though inadmissible in evidence to discharge the banker, is admissible to prove the receipt of money by means of it as part of the *res gestæ*. *Blair v. Bromley*, 11 Jur. 617.

An unstamped cheque might be given in evidence in such a case as the following:—In an action for a debt, with a plea of payment, the plaintiff might prove his case by means of a document in which the defendant had admitted the debt claimed, but went on to allege that he had paid it by a cheque, and would be allowed to use in evidence the unstamped cheque to negative the

bearer, appears to have undergone no alteration by recent legislation. If a cheque payable to bearer is post-dated,

alleged payment. *Smart v. Stokes*, 6 M. & G. 911. The production of the cheque was here obviously allowed, not for the purpose of enforcing it as a valid subsisting instrument valuable to the extent of the sum for which it purported to be drawn, but as the means, and the only means, of establishing its nullity for want of a stamp, and therefore the admission of it was in strict conformity to the principles of the stamp laws. In an action on the cheque the defence that it had been issued at a place beyond the fifteen miles was admissible under a plea denying the making, *M'Dowell v. Lyster*, 2 M. & W. 52; *Jenkins v. Creech*, 5 Dowl. 293, and it was not necessary to plead the fact specially.

Post-dating.]—Unless duly stamped, a post-dated cheque was void; *Allen v. Keeves*, 1 East, 435; *Whitwell v. Bennett*, 3 B. & P. 559; and the parties concerned in giving, receiving and cashing it, were liable to the penalties above stated. This was the case, although the post-dated cheque was not intended to be used until the day of the date, and it was void altogether, even against a bona fide holder. *Serle v. Norton*, 9 M. & W. 309; *Field v. Woods*, 7 A. & E. 114; *Steadman v. Duhamel*, 1 C. B. 892.

In fact, in scarcely any instance is a post-dated cheque intended to be used before the day of the date; the object, in delivering such an instrument, is to create a security till the day on which the cheque is available.

The payee of a post-dated cheque, knowing it to be so, and also knowing that the maker was insolvent, presented it to the banker, upon whom it was drawn, who, being ignorant of these circumstances, paid the cheque for the honour of the drawer: the banker was held entitled to recover from the payee the amount of the cheque. *Martin v. Morgan*, 3 Moore, 635; 1 B. & B. 289. In *Poulton v. Watson*, 15 Jur. 1112, it was held that if a banker paid a post-dated cheque, without knowing of the false date, the payment was good.

Where a person, having credit with a banker, received money from the agent of the bank, and every week gave that agent an unstamped cheque on the bank for the amount advanced during the week, which the agent sent to the bank as a voucher for himself, and this cheque was drawn more than the limited distance from the bank, and post-dated; it was held to come within the exception, this not being an issuing within the meaning of the statute. *Ex parte Bignold*, 1 Deac. 735; 2 Mont. & Ayr. 633.

It must be proved that the banker cashed the cheque, with the full knowledge that it was issued in the prohibited manner, before he could be made liable to the above-mentioned penalty, for knowingly paying. *Ex parte Bignold*, 1 Deac. 735.

In a case which occurred before the statute 55 Geo. III. c. 184, it was shown to be contrary to the usage of London bankers to pay a cheque before the day of its date, and therefore a banker, who had so cashed a cheque that had been lost, was made to repay the amount to the party who had lost the cheque; *Da Silva v. Fuller*, Chitty on Bills, 180, 272, 10th edit.; and *per Parke, B.*, 7 M. & W. 178.

The defence of post-dating may be taken in an action on the cheque under a plea denying the making. *Woods v. Field*, 6 Dowl. 23.

The following case arising out of the Scottish system of banking, under what is called a cash credit, is opened at a bank, which gives the party, in whose favour it is granted, the right of drawing cheques upon the bank to the extent of the credit, he finding security, may also be referred to in illustration of the invalidity of cheques drawn in contravention of the 55 Geo. III. c. 184. There, the customer of the bankers drew upon them at a place beyond the limited distance (his cheques being falsely dated at a place within that distance); the cheques were also post-dated; the House of Lords

and is not stamped at the time of issue with a bill of exchange stamp applicable to its amount, it is void and inadmissible in evidence for the purpose of enforcing it (z). But a cheque payable to order, although post-dated, if stamped with a duty of a penny, is a valid instrument, the date appearing on the face of the instrument is to be taken as in the case of a bill of exchange, which may be post-dated, as the true date on which it was drawn (a); and this is so although the effect may be to make the instrument require a less stamp than if it had been dated correctly, and payable at the same time (z). It has not been decided whether the drawer of such a cheque is subject to a penalty, or to be sued for the difference of stamp duty (z).

When an adhesive stamp is used, the drawer, before parting with the cheque, must, by the 16 & 17 Vict. c. 59, s. 4, cancel the stamp by writing thereon his name or his initials, under a penalty of 10*l*.

Cheques exempted from Stamp Duty.—23 & 24 Vict. c. 15, Schedule, exempts any draft or order drawn by any banker upon any other banker, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers; any letter written by a banker to any other banker directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf; and all drafts or orders drawn by the Accountant-General of the Court of Chancery in England or Ireland, from all stamp duty.

5. *That the Cheque be made payable to Bearer, or Order, on demand.*—A cheque may be either payable to

decided that the bankers, being cognizant of the mode of drawing, could not recover from the customer's surety upon his bond the amount paid upon these cheques, no debt having been in law incurred by the customer to the bankers. *Swan v. Bank of Scotland*, 10 Bligh, N. S. 627; 3 Cl. & F. 610.

(z) *Key v. Mathias*, 3 F. & F. 279; *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

(a) *Williams v. Jarrett*, 5 B. & Ad. 32.

bearer or to order. When payable to bearer by the nearly universal practice as regards bankers' cheques, a name is inserted, as of a person, in whose favour the cheque is drawn; and the convenience of this is obvious, for by inserting the name or the word "self," and then adding, "or bearer," either the payee in person, or any one to whom he may deliver the cheque, is competent to receive the cash for it, and the banker is bound to pay it.

That it is not indispensable to name an individual is shown by this, that a cheque drawn thus, "Pay ship *Fortune*, or bearer," is valid, and may be sued upon by the bearer (*b*).

It will be observed that a cheque is required by the statutes to be made payable to bearer or to order on demand; it does not, however, follow that it need contain the words *on demand* on the face of it; for if made payable to bearer or to order, that makes it in law payable on demand (*c*).

A cheque payable to bearer may be endorsed, and entitle the indorsee or a subsequent holder to sue the indorser thereon (*d*). A payee, however, writing his name on the back of a cheque, as an acknowledgment of payment, is not such an endorsement as subjects him to any liability. A cheque payable to order, when endorsed in blank, becomes payable to bearer. This class of cheques has been described as being the statutably privileged class of drafts as will be evident by the following provision (*e*).

As to Cheques payable to Order on Demand.—With respect to endorsed cheques, it has been enacted by the 16 & 17 Vict. c. 59, s. 19, that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker

(*b*) *Grant v. Vaughan*, 3 Burr. 1527; *Gibson v. Minet*, 1 H. Bl. 609.

(*c*) *Hare v. Copland*, 13 Ir. Com. Law Rep. 426.

(*d*) *Keene v. Beard*, 8 C. B., N. S. 372; 29 L. J., C. P. 287.

(*e*) *Per Christian, J.*, in *Hare v. Copland*, 13 Ir. Com. Law Rep. 430.

to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any endorser thereof (*f*).

It has been held by Martin, B., at *Nisi Prius*, that an endorsement per procuration is within the meaning of this enactment (*g*); and, consequently, if it is forged or written without the authority of the payee, the banker is protected in paying the amount to the holder of the cheque. So where the signatures of the payees are forged or fraudulently obtained, and the banker pays to the bearer of the cheque without knowledge or notice of the forgery or of the fraud, he is entitled to the benefit of the statute and

(*f*) Notwithstanding this statute, however, it would probably not be safe for bankers to pay a cheque, purporting to be drawn by a customer and to be endorsed by the payee, without ascertaining the genuineness of both signatures, *if the customer had at the time of the presentment and payment no funds in their hands*; for it has been held in the analogous case of a bill, accepted by a customer payable at his bankers, that they were liable on paying the bill for his honour, not having funds, and could not recover from the customer, not having taken means to ascertain the correctness of the acceptance and endorsement. *Forster v. Clements*, 2 Camp. 17. The statute does not appear to alter the principle of this decision as applicable to cheques, as it turns on the circumstance that the bankers, in the absence of funds of their customers, are not bound to pay the bill, and therefore, if they choose to do so, they act under peril of being responsible, in case the instrument turns out to be vitiated by fraud or forgery. The statute can only be taken, it is submitted, to relieve bankers from the necessity of ascertaining the genuineness (so as to be able to prove it at the trial) of the payee's endorsement, and in cases where, independent of any consideration of the endorsements, they would be bound to pay the cheque. The statute may be considered as saying, "if, given the genuineness of the payee's endorsement, &c., you would by the law, and by the usage of bankers, be bound to pay, there you shall be relieved from the necessity of proving the payee's endorsement, &c., and shall be entitled to have the benefit of such a payment, on showing an endorsement, purporting to be that of the payee." But, in the case above stated, the bankers would not be bound to pay a cheque, without first having funds of the person purporting to be drawer in their hands, and without, secondly, being satisfied, and therefore able to show, that a person purporting to be the drawer, and having funds in their hands, actually drew the cheque presented and paid.

[The above paragraph appeared in the text of the first edition of this work, and is retained in a note, for although the law, which it contains, may be questionable, the point discussed has not been judicially decided.]

(*g*) *Cookson v. Bank of England*, Guildhall Sittings, 29 June, 1860, referred to and commented upon in *Hare v. Copland*, 13 Ir. Com. Law Rep. 438, 444, 449.

exonerated from liability (*h*). It is, however, essential that the signature on the back of the cheque should purport to be in the handwriting of the person to whom it is payable, the cheque need not in express terms be made payable on demand, it will be sufficient, if payable to A. B. or order, without the words on demand (*h*).

5. *The Cheque must bear the Drawer's Signature.*—Signature does not necessarily mean subscription, or writing the full name at the foot of the document; if the name appear in any part of the cheque, so as to show who it is that orders the payment, that will be sufficient to authorize the bankers to pay, provided the handwriting be that of their customer of the name stated. For the reason of requiring signature will be thus satisfied; for adequate means of identification by the handwriting will be afforded (*i*).

Thus a cheque would be good which, instead of being subscribed with the name of the drawer, as in the form above given, was expressed thus:—"I, John Stiles, desire you to pay," &c.; and were properly addressed, &c.; or thus: "Mr. Stiles desires Messrs. Holdfast to pay," &c.; for in either case, being written by the party drawing, the cheque would contain sufficient means of identification.

An illiterate person must draw a cheque, by placing his mark, in the usual place of writing a name and style, on a cheque, the body of the cheque being filled up in the usual manner (*k*).

An infant cannot draw or sign a valid cheque; in other words, a banker cashing the cheque of an infant, is not thereby discharged; for a person under age cannot draw a cheque, for he cannot give a legal discharge (*l*).

(*h*) *Hare v. Copland*, 13 Ir. Com. Law Rep. 426.

(*i*) *Taylor v. Dobbins*, 1 Stra. 399; *Saunderson v. Jackson*, 2 B. & P. 238.

(*k*) *Per Maule, J., Serrell v. Derbyshire, &c. Railway Company*, 19 L. J., C. P. 373; 9 C. B. 827.

(*l*) See *per Lord Abinger, C. B., Calland v. Lloyd*, 6 M. & W. 31.

Executors and Administrators.—Executors, however numerous, are regarded in law as an individual person; and therefore the acts of one of them, in respect of the administration of the effects, are deemed to be the acts of all. Hence payment to one is payment to all; and it follows that if a number of executors has a fund standing in their joint names at a banker's, payment of a cheque signed by one of the executors will discharge the banker as to all of them (*m*). So it would be, although the executors were acting under a forged will (*n*).

So a payment of the cheque of any of several administrators, made *bonâ fide*, would discharge the banker, although a will should afterwards be found (*o*).

So a payment of the cheque of a surviving administrator of several, exonerates the banker: in a case where such survivor drew out a fund and absconded, the loss fell on the estate of the deceased administrator (*p*).

Assignees of Bankrupts.—With respect to the assignees of a bankrupt, payment to one of several has been held not to be good (*q*); there are, however, other cases (*r*) in which such payment has been held valid to discharge the debtor when made *bonâ fide*, and unless the other assignees have expressed their dissent.

It would seem, therefore, doubtful whether a banker would be discharged by honouring a cheque signed by one of several assignees, in ordinary circumstances.

Agents.—An agent has no authority, as such, to overdraw a banking account; but if he has done so, with the knowledge of his principal, that is evidence from which the jury may infer authority (*s*).

(*m*) *Ex parte Rigby*, 19 Ves. 462; *Can v. Read*, 3 Atk. 695.

(*n*) *Allen v. Dundas*, 3 T. R. 125.

(*o*) *Pond v. Underwood*, 2 Ld. Raym. 1210; *Prosser v. Wagner*, 1 C. B., N. S. 289.

(*p*) *Clough v. Bond*, 3 M. & C. 490.

(*q*) *Can v. Read*, 3 Atk. 695.

(*r*) *Smith v. Jameson*, 1 Esp. 114; *Bristow v. Eastman*, id. 174.

(*s*) *Pott v. Bevan*, 1 Car. & K. 335.

Husband and Wife.—Money deposited in a bank by a husband in the joint names of himself and his wife, as a provision for her in case of his death, upon his death, becomes the absolute property of the wife (*t*).

Trustees.—In the case of trustees in general, or any other body of persons not being in partnership, having deposited money to their joint account with bankers, the latter are, by the nature of the relation between banker and customer, as regulated by the usage of banking, entitled to have assurance that each of the trustees, or each of the body of persons, assents to and authorizes the money being paid out, and therefore, in such case, the law is that each trustee, or each of the body, must sign the cheque (*u*), or the bankers may refuse to pay it; for they will not be discharged if they do pay it, except where, subsequently to the deposit, the drawer has become alone entitled to receive the money (*u*).

In the case of several persons, not partners, having a joint deposit account with bankers, they could not plead in bar with effect, nor could they even plead, it would appear, in abatement, that since the commencement of the action they had paid the sum on the cheque of one of the plaintiffs; for, though it is a general position, that a payment, or an accord and satisfaction, of the joint debt may take place between one of several plaintiffs and the defendant, which the latter may set up against the further maintenance of the action, that only holds where there is nothing illegal in the transaction; but, it seems, that the law merchant prevents a payment on a cheque drawn by one of several, not in partnership, from binding them so as to cancel so much of the joint debt, and therefore that the payment having been made by the bankers, in violation of the law and in their own wrong, cannot be so taken advantage of; in other words, the bankers would be liable to pay the

(*t*) *Williams v. Davies*, 33 L. J., Prob. Cas. 127.

(*u*) *Innes v. Stephenson*, 1 M. & Rob. 145; *Husband v. Davis*, 10 C. B. 640; *Stone v. Marsh*, R. & M. 364; *Lee v. Stewart*, M. & M. 160.

money over again (*x*). If they would not be liable at law to the joint action of the depositors, to one of whom they had already paid the money, they certainly would in equity be liable to make compensation to those who were injured by their breach of trust (*y*). Nor, in the absence of fraud, could they recover from the drawer of the cheque the sum they had paid him ; for a sum paid with a full knowledge of the facts (knowledge of the law being imputed) cannot be recovered back ; it is in such case a gratuitous donation.

Where one of such trustees has absconded, so that his signature cannot be obtained, equity will relieve by making an order that the bankers shall pay the cheque of the remaining trustees (*z*) ; at least, this will be done in bankruptcy in the case of assignees of bankrupts absconding or dying ; and so in the case of other trustees of funds over which the Court has control (*a*) ; *and in such case* the Court would probably order, in proper circumstances, the payment to one alone, however numerous the trustees might be (*b*).

The above position, with respect to the relief in equity when the signatures of all the persons (not partners) to whose joint account money is in the hands of bankers, has been stated, in a work of authority, in more general terms, as if equity would assist, in all cases, where it was become impossible to obtain the full complement of signatures (*c*) ; but there appears to be no decided case, furnishing any ground to suppose that such interposition may be had, in any instances but those, where the fund is already, from some special circumstances, under the control of the Court ;

(*x*) Compare *Wallace v. Kelsall*, 7 M. & W. 242, with *Husband v. Davis*, 10 C. B. 640.

(*y*) *Brandon v. Scott*, 7 El. & Bl. 234, 237 ; 26 L. J., Q. B. 163.

(*z*) *Ex parte Hunter*, 2 Rose, 363 ; 1 Mer. 408.

(*a*) *Ex parte Collins*, 2 Cox, 427.

(*b*) *Shortbridge's case*, 12 Ves. 28. See as to trustees having funds in private banks, 12 & 13 Vict. c. 74.

(*c*) See Byles on Bills, 24 (8th edit.). None of the numerous works on Chancery Practice state any such rule.

and the language of the legislature, in the "Act for the further Relief of Trustees," seems to show that there was no such general practice, even in favour of trustees, previously to 1849; for it empowers any equity judge, where monies shall be deposited with any banker on the account of any persons as trustees, executors or administrators, or *otherwise*, to make such order for the payment of such monies to the major part of such trustees, &c., where for any reason the concurrence of the others cannot be had, &c., as to the said judge shall seem meet, &c. (*d*).

Partners.—In the case of partners having a joint account with a banker.

"There is no doubt but that the act of every single partner in a transaction relating to the partnership binds the others," where there is no collusion or *crassa negligentia* on the part of those in whose favour the act is done (*e*).

Therefore, in the absence of any special agreement, fixing the mode in which cheques should be drawn upon the partnership fund, in his hands, the banker would be bound to honour cheques drawn in any of the modes following:—

1. A cheque bearing the signature of any one of the partners. This is allowed by the law merchant, and is in accordance with the usage of bankers.

2. A cheque bearing the signatures of all or any number of the partners: *à fortiori* of a proper majority acting *bonâ fide*.

3. A cheque, bearing the name or style of the firm, in the handwriting of any one of the partners.

(*d*) 12 & 13 Vict. c. 74, s. 1. Comparing this act with the former Trustees Relief Act, 10 & 11 Vict. c. 96, which it was passed to amend, it seems difficult to perceive the need for it, if the Courts of Equity had already the general power of ordering any funds standing in a bank, to the joint account of several, to be paid, in proper circumstances, on the cheque of a single one.

(*e*) *Per* Lord Mansfield, C. J., *Hope v. Cust*, 1 East, 53; Collyer on Partnership, 334.

4. A cheque signed by one of the partners, thus—"A., B. and Co., per procuration of A." (*h*).

5. A cheque signed by a partner, stating himself to sign for self and the rest of the partners (*i*).

If the name of the firm be inaccurately stated, it would seem that the banker ought not to cash the cheque without inquiry; for such a defect would probably be considered by a jury as sufficient to awaken the suspicion of a prudent man, unless it were shown that such departure from the proper style was habitual, on the part of the member of the firm, in whose handwriting the cheque had the appearance of being drawn, or unless it were agreed upon, between the banker and the partnership, that he should honour cheques so drawn. On the other hand, without such inaccuracy having been usual, and in the absence of any agreement it would seem that a banker would be justified in refusing payment, because it is probable the Courts would hold such cheque not to bind the partnership, if it were drawn by one partner without the authority of the rest, express or clearly implied (*k*).

A question may arise, whether one partner could not bind the partnership, by signing the names of all the partners, though the style of the firm did not consist of those names (*l*), and without special authority.

So strong is the rule—payment to one of several partners of a debt due to the partnership is payment to all (*m*)—that even after a dissolution of partnership, of which the bankers have notice, and though a person has been appointed by the joint assent of all the partners, and with

(*h*) *Williamson v. Johnson*, 1 B. & C. 149. It is not uncommon for clerks to be empowered to draw cheques in the name of the firm, but the clerk in such case is not liable on the cheque. See *Wilson v. Barthrup*, 2 M. & W. 866. Nor could he therefore sue thereon. *Driver v. Burton*, 17 Q. B. 989.

(*i*) *Ex parte Buckley*, 14 M. & W. 469. As to a deed so executed, see *Smith v. Winter*, 4 M. & W. 454; *Burn v. Burn*, 3 Ves. 573.

(*k*) See *Kirk v. Blurton*, 9 M. & W. 284; *Sheppard v. Dry*, Byles on Bills, 41, n. (8th edit.); *per Tindal, C. J.*, *Bawden v. Howell*, 3 M. & G. 641; *Wintle v. Crowther*, 1 C. & J. 310.

(*l*) *Per Maule, J.*, *Norton v. Seymour*, 3 C. B. 792.

(*m*) *Anon.* 12 Mod. 446; *per Tindal, C. J.*, 3 M. & P. 555; *Duff v. East India Company*, 15 Ves. 198.

the knowledge of the bankers, to receive the debts of the partnership, unless there is something in the notice which expressly takes away the power of any one partner from receiving a debt due to the partnership, the bankers may honour the cheque of any one, and will be discharged (*n*).

Two sisters carry on business jointly as farmers, living together; they have a joint account at their bankers; they invest part of their money in consols in their joint names; they have a large balance due to them from their bankers; they have also a sum due to them from their bankers on deposit notes: on the death of one, it was held, that they were joint-tenants of the consols, and tenants in common of the balance and of the deposit notes (*o*).

If one of two partners opens an account with a bank in his own name, this is not conclusive to show the account to be his solely; the banker may prove that the partner was acting as agent for the firm, in so opening the account, but the mere fact of the money deposited being partnership property is not sufficient to show that, in an action by the other partner for dishonouring his cheque (*p*).

What has been said respecting partners signing cheques relates only to persons who are known to the bankers to be members of the firm, and not to partners who are not so known; for a banker would not be bound to honour the cheque of a dormant partner, whom he was ignorant to be jointly interested in the fund with the others, although he were satisfied of the genuineness of the signature, and he could not, therefore, safely do so until he had got the authority of the firm (*q*).

The name in the pass-book is not conclusive that the bankers contracted with that person *alone* (*r*).

Where two houses of business are partners in a particular transaction and have a joint sum to the account of

(*n*) *Porter v. Clay*, 6 M. & S. 156.

(*o*) *Bone v. Pollard*, 24 Beav. 283.

(*p*) *Cooke v. Seeley*, 2 Exch. 746.

(*q*) See *per Parke, B.*, *Cooke v. Seeley*, 2 Exch. 749.

(*r*) *Sims v. Bond*, 5 B. & Ad. 389.

the transaction in the hands of a bank, payment of the cheque of one house, out of that fund, is payment to both (s).

Corporations.—When a corporate body has a deposit at bankers it is in accordance with strict principles to lay down, that the bankers would not, at common law, be discharged by payment of a cheque that was not under the common seal, or signed by some officer of the corporation, whose signature the bankers were authorized to honour, by authority expressly given in an instrument under the common seal; but in most cases of statutory corporations power is given to three directors, or to a finance committee, or to other officers or persons designated in the act, to draw and sign cheques, &c. In such cases the cheques ought to bear the signature (and, where that is required, the countersign) of all the parties designated. Thus, without a special enactment, the signature to a cheque of the chairman of the finance committee of a railway or other incorporated company would not be valid; the committee not being a partnership nor a corporation, all the members ought to sign; and in the absence of an agreement binding on the corporation, that the bankers should honour cheques signed in some other specified manner, they could not safely do so. Nor could the payee recover against the corporation. Thus, where a statute gave power to three directors to sign, &c. and the cheque, on which the company was sued, was in fact signed by three persons, who, it was proved, were directors of the railway, but they did not state themselves to be directors on the face of the cheque; there, although it was countersigned by a person who added the word secretary to his name, and who seems to have been secretary to the company, and although the company had funds in the bank, upon which the cheque purported to be drawn, and

(s) Collyer on Partnership, 455.

it was impressed with a stamp containing the name of the corporation, the plaintiff failed. It is true, there were the strong circumstances that it was intended to effect the payment of a sum of the company's money, to a third party, in fraud of the company, and in violation of the special act; but it seems probable that, in the absence of these latter facts, the judgment would have been the same, viz., that it was not a cheque purporting to be a cheque of the company, and was not binding on them (*t*).

It seems to be unsettled whether a cheque drawn in the above mode, or in a mode having similar peculiarities, might or might not be good to bind the corporation, if it were shown, which was not done in the above case, that they had been in the habit of recognizing cheques drawn in exactly the same form, but the better opinion seems to be that, however this might be decided if the question came before the Court clear of any circumstances of fraud or dishonest intention, at any rate they would not be bound by a cheque concocted as part of a dishonest transaction (*u*), though it might, on the face of it, conform to the appearance of others to which it was their practice to give credit.

It has been held in equity, in a case where the deed of settlement of a trading company had a clause that all cheques were to be signed by three directors, that this was directory merely; and the directors were allowed any sums drawn from the bank by cheques, though not so signed, if the proceeds had been *bonâ fide* applied to the purposes of the trade (*x*).

Having thus seen in what circumstances it is incumbent upon bankers to cash cheques, next:—

(*t*) *Serrell v. Derbyshire, &c. Railway Company*, 19 L. J., C. P. 371; 9 C. B. 811.

(*u*) See *S. C.*, per Cresswell, J., compared with the observations of Maule and Talfourd, Js.; *Barber v. Gingell*, 3 Esp. 60; *Levy v. Pyne*, Car. & M. 453; *Bult v. Morrell*, 12 A. & E. 745.

(*x*) *In re Norwich Yarn Company*, 22 Beav. 143; 25 L. J., Chanc. 601.

In what Coin or Notes may Cheques be legally paid by Bankers.—Then, as to the mode of cashing cheques by bankers, for any sum not exceeding forty shillings, a tender of payment of a cheque in silver would be good, because any tender up to forty shillings made in silver is good (*y*) in ordinary cases of debt.

Above forty shillings, and up to and including 5*l.*, gold appears to be the only legal tender; for it is only in case of sums above 5*l.* that Bank of England notes are at present a legal tender, and a banker would be justified in paying cheques accordingly.

With respect to sums above 5*l.*, the following is the subsisting law:—By 3 & 4 Will. IV. c. 98, s. 6, a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount, for all sums above five pounds, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their notes in legal coin; provided always, that no such note or notes shall be deemed a legal tender of payment by the governor and company of the Bank of England, or any branch bank of the governor and company; but the governor and company are not to become liable or be required to pay and satisfy at any branch bank of the governor and company any note or notes of the governor and company not made specially payable at such branch bank; but the governor and company shall be liable to pay and satisfy at the Bank of England in London all notes of the governor and company, or of any branch thereof.

By 8 & 9 Vict. c. 38, s. 15, which was passed for the purpose of removing doubts as to the extent of the operation of 3 & 4 Will. IV. c. 98, the notes of the Bank of

(*y*) 56 Geo. III. c. 68, s. 11. A tender of a debt in copper is not good beyond two pence, as it seems, 1 Bl. Com. 277; considering that fourpenny and threepenny pieces form now a part of the currency.

England were declared not to be a legal tender in Scotland, although they may circulate in Scotland. So, by 8 & 9 Vict. c. 37, s. 6, Bank of England notes were declared not to be a legal tender in Ireland, although there is nothing to prohibit their circulation in that country.

Therefore a cheque for 100*l.* may be cashed at any bank, but the Bank of England or one of its branch banks, in the following manner, without the banker incurring liability, for refusing to honour the cheque or otherwise. He may pay 40*s.* in silver; he may and must pay the next 3*l.* in gold; the remaining 95*l.* he may pay in gold or Bank of England notes "expressed to be payable to bearer on demand," which therefore must not be made specially payable at a branch bank it is apprehended, but must be the ordinary Bank of England notes, payable at the Bank of England in London, otherwise the payee of the cheque might refuse them, and the drawer might recover damages in an action against the banker, for refusing to honour his cheque.

A depositor's cheque must be paid at the Bank of England, or one of its branch banks, in gold, for sums above 40*s.*, if he chooses to insist upon it, provided the whole amount demanded above 40*s.* can be expressed in gold coin; thus, 2*l.* 10*s.* can be paid with a half sovereign and 40*s.* in silver; 2*l.* 5*s.*, with a half sovereign and 35*s.* in silver.

If the above be correct, it will follow that a customer who draws a cheque for 100*l.* on his banker, or the bearer, can only demand 3*l.* of it to be paid in gold; and so of any cheque for a greater sum than 100*l.*; and the same is obviously the case of any smaller sum down to 5*l.*, and so *mutatis mutandis* of sums under 5*l.* and above 40*s.* The almost uniform custom of bankers to consult the pleasure of the payee or bearer, as to how he wishes to have the cash paid over to him, is merely a matter of courtesy, and in no respect, except as above mentioned, obligatory on them.

But if the cheque be cashed in forged Bank of England notes, the payment is a nullity; for it is only in *valid* bank notes that a tender can legally be made (z); and the law appears to be that, in strictness, the drawer might recover damages from the banker for dishonouring his cheque, although the banker were ignorant when he tendered the bank notes that they were spurious; for the payee of the cheque may certainly treat the debt due to him from the drawer as unpaid, and may recover it from him; and consequently the drawer may recover from the banker according to the rule above stated, that when a loss must fall upon one of two innocent parties, the sufferer must be the party whose conduct has most immediately led to it; and here the banker is guilty of laches and negligence in not ascertaining the genuineness of the bank notes before he tenders and passes them.

As there is no privity between the bearer and the banker, and the former is merely the hand into which the banker is directed by the drawer to pay the debt which the banker owes to him (the drawer), and the order of the drawer cannot operate to make the banker debtor to the bearer, of course the bearer cannot sue the banker for non-payment, unless in an unusual case of the bankers accepting the instrument (a).

In Country Bank Notes.—From what has been said, it will be seen how great is the difference in the situation of the payee of the cheque, when the payment is made by the banker in notes of the Bank of England, and in notes of any country bank: for a payment in spurious paper, purporting to be that of the Bank of England, is a nullity, whether objected to or not at the time; and the banker, upon the forgery being discovered, must pay over again the sum which they purported to represent, provided the payee of the cheque has not paid them away, and got

(z) See *per* Littledale, J., *Camidge v. Allenby*, 6 B. & C. 385.

(a) *Bellamy v. Marjoribanks*, 21 L. J., Exch. 77; 7 Exch. 389.

value for them, in the meantime ; and the reason is, because the payee is *primâ facie* bound to take such notes in payment everywhere, but from the Bank of England or its branches, and, the legislature having made them a part of the currency, the genuineness of such notes is *primâ facie* to be presumed, and if not, the payee has no ready test by which it can be ascertained, or even an approximation to proof be made, whether they are good notes or forged : he is therefore *primâ facie* obliged to take them, when tendered in payment.

With respect to country bank notes the case is different, they form no part of the currency ; the payee's choice of taking or refusing is absolutely free ; he is aware not only that they may be forged, but (what is quite possible in this case,) that the country bank may have stopped payment before they can be presented. If therefore the payee elects to take them as cash, he must be held to have chosen to bear either of the risks that attach to them, and the banker, if he have made no improper representations to induce the payee to receive them, and did not know at the time that he tendered them in payment that for any reason they were worthless, or likely to be so by the time they could be presented at the country bank for payment, will be absolved from further liability.

Counterfeit Coin.—Similarly in case the banker innocently makes the payment in bad coined money, the payee, taking it in payment without objection on the moment, that is before the transaction of the presentment and payment can be considered as fairly at an end, cannot afterwards complain, and must bear the loss, for he takes it at his peril ; and, having once recognized it as money, cannot afterwards be allowed to say it is not so. This, which is the general rule applicable wherever a debt is paid in coin, seems to rest on satisfactory grounds ; for there are various and well-known tests which may readily be applied for the purpose of ascertaining the goodness of money, as

weighing, ringing, &c.; and, moreover, it would obviously open a door to fraud, and endless confusion and delay of business, if the payee of a debt were allowed to say that "such and such coins were received in payment from the debtor and were bad; their account must be paid over again." In most instances, this would be to place the debtor, who would be without any means of showing that the coins he paid with were other than those which the creditor alleges to be forged, at the mercy of the latter. The principle, therefore, that a loss which must fall upon one of two innocent parties, shall fall upon that one whose conduct has given rise to it, seems to apply here; and to show the propriety and justice of ruling that the payee who might, but did not, apply some test, or take the objection at the proper time, is for ever concluded. If the banker, upon the objection being made, should insist that the money is good, and refuse to change it for other coins, the payee ought to request him to put some private mark upon the money, and perhaps to place it in the hands of some third person, until it could be assayed, or other decisive means taken to ascertain its real value.

On the other hand, a banker cannot discharge himself from liability on a customer's cheque by tendering payment in any other money than English current money, or in any other form, denomination, or quantity of each denomination, than such as a tender of a debt may legally be made in (b).

Direction to pay in Bills of Exchange or Promissory Notes.—By agreement between the drawer and banker, his cheque may direct payment to be made in bills of exchange or promissory notes, but any cheque which does so is void, unless duly stamped, by virtue of the proviso in the 55 Geo. III. c. 184, Schedule, Part 1.

A. signed an order on his bankers, directing them, out of

(b) *Wade's case*, 5 Rep. 114 a, Co. Litt. 207 b.

the balance due to him on the final arrangement of his account, to pay to B. a certain sum; he delivered this order to B., and accompanied him to the bank: it was held that the order required a bill stamp under the above statute (c).

At the Option of the Payee or Bearer.—The extent to which a party may insist that his cheque shall be cashed in particular descriptions of money or currency, also the extent to which bankers are bound to pay in particular denominations of coin, has been stated above, but nothing that has been said must be understood to invalidate the power, which the parties possess, of entering into any agreement to make and receive the payment of cheques, by any descriptions of valuable circulating medium that they choose, although such be not recognized by law as money.

Thus, if the bearer of a cheque requests or does not object, *at the time of payment*, to receive payment in country bank notes, the banker may so cash the cheque, and the bearer cannot afterwards object that the notes turned out to be worthless (d), provided that all has been fair and honest on the banker's part; but if there has been any unfairness or fraud practised by the banker, as if when tendering them in payment the banker knew that the bank which issued the notes was in a failing condition, there the notes, though not objected to at the time, would not be a good payment (e), and the banker would remain liable to the drawer to the full amount of the cheque, and probably to damages for dishonouring it; for his having induced or allowed the bearer to take, as payment of the cheque, that which he was aware it was doubtful, at least, whether it could ever be realized as money, was an injury to the drawer, for which, though it might be considered

(c) *Parsons v. Middleton*, 6 Hare, 261.

(d) *Polglass v. Oliver*, 2 C. & J. 15; *Vernon v. Bouverie*, 2 Show. 296.

(e) *Spurraway v. Rogers*, 12 Mod. 517.

not to wear exactly the same aspect as a dishonour by way of declaration that the drawer had no assets in his hand, still is prejudicial to him, in this respect, that he is unnecessarily and without any fault of his, obliged to pay the debt over again to the creditor to whom he delivered the cheque, as payment of the debt between them ; and the drawer of a cheque has a right to require that his draft shall be promptly and effectually and *bonâ fide* cashed. The payee or bearer has no recourse against the banker, because the effect of the cheque is only to designate the hand to which the banker shall pay his debt to the drawer, not to constitute the banker the debtor of the party presenting the cheque. Therefore, in the case of a payee having taken a cheque in payment, and sending his servant to present the cheque, the cheque being paid by the banker as above, the payee would be enabled, it would seem, to come upon the drawer for the amount, on the ground that without fault, on his part, the original debt was still undischarged. So, if the cheque had passed through several hands before arriving at the party who presented it, it seems the bearer might have recourse to the party from whom he received it, and he to the party who paid it to him, and so on till the payee ultimately would recover from the drawer.

Payment by Bills of Exchange.—So the payment of a cheque may be made, if the holder pleases, by a bill of exchange drawn by the banker (*g*). But under this head many points are to be noticed.

1. If the drawer of the cheque, sending his servant to get it cashed, orders or gives him permission to take, instead of cash, the banker's bill of exchange, that is, a bill of exchange drawn or indorsed by the banker, the drawer of the cheque will only be entitled to come upon the

(*g*) Com. Dig. tit. Merchant, F. 17. So also, in like circumstances, the banker may pay a cheque by his promissory note. *Sayer v. Wagstaff*, 5 Beav. 415.

banker for the amount in case of the bill not being paid at maturity, if he has taken all due measures to obtain payment of the bill, by endeavouring to get it accepted, &c.; for it follows, from the legal relation between a banker and a depositor of money with him, that the former is the debtor of the latter, and by the express words of the 3 & 4 Anne, c. 9, s. 7 (*h*), "if any person doth accept any inland bill of exchange for and in satisfaction of any former debt or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid, &c." If, therefore, the drawer of the cheque takes all due steps for the above purposes, then the loss, if the bill is dishonoured at maturity, must fall not upon him but upon the banker; if he neglects to take proper measures he must bear the loss.

2. In the case of the payee, however, the statute does not apply, because there is no debt antecedent or otherwise between the banker and him, he is only the hand appointed by the banker's creditor who draws the cheque, to receive payment of the banker's debt to the drawer. If, therefore, the payee chooses, on presenting the cheque, to take the banker's bill of exchange instead of cash, and the bill is not paid, the payee must bear the loss; he cannot have recourse to the drawer of the cheque, for the drawer, having given him the means of getting his debt discharged in cash, cannot be in a worse position because the payee has elected to take something else (*i*); and he cannot come upon the banker, because he exercised his option when he might have insisted on payment in money; the consequence is, that, in the absence of fraud in the banker, the payee of the cheque bears the loss.

(*h*) Nearly the same thing had been ruled before the statute in *Darrach v. Savage*, 1 Show. 155. If the servant had no authority to take a bill of exchange in payment, the case would be different, and the banker would be liable. *Ward v. Evans*, 2 Ld. Raym. 928.

(*i*) *Smith v. Ferrand*, 7 B. & C. 24; Com. Dig. tit. Merchant, F. 17.

3. The same must be the case, although the cheque had circulated through any number of hands before getting into the possession of the bearer, who ultimately presents it for payment; if he chooses, under the circumstances above mentioned, to take in payment the banker's bill, the drawer and all the successive holders between the drawer and the person presenting for payment are wholly discharged, for none of them are consenting parties to the bearer's election to take less than cash, and cannot therefore be liable for the consequences; therefore, in the absence of fraud in the banker, the bearer suffers the loss.

In none of these three cases can the drawer sue the banker for dishonouring his cheque, or otherwise. The general principle that an objection to a tender must be made at the time of the tender, seems to apply here (*k*), and the banker is exonerated by showing that he paid the cheque in a manner with which the bearer was satisfied.

So if the bearer requests it, or does not object at the time, the payment may be effectually made, in the absence of fraud or concealment of facts, in bank post bills (*l*).

So, in like circumstances, payment may be made by another cheque drawn by the banker, and the loss, if any, must fall on the taker (*m*).

Cashing Cheques over the Counter.—Where a cheque is cashed over the counter the money ceases to be the money of the banker, and he cannot revoke or recal the payment, although he should immediately discover that the drawer's account is considerably overdrawn (*n*).

We proceed to consider a banker's liability as to refusing to pay his customer's cheques.

(*k*) *Richardson v. Jackson*, 8 M. & W. 298; *Bull v. Parker*, 2 Dowl. N. S. 345.

(*l*) *Tiley v. Courtier*, 2 C. & J. 16; *Lichfield Union v. Greene*, 1 H. & N. 884.

(*m*) *Jones v. Arthur*, 8 Dowl. 442; *Wilby v. Warren*, 2 C. & J. 18, n.

(*n*) *Chambers v. Miller*, 13 C. B., N. S. 125; 32 L. J., C. P. 30; 3 F. & F. 202.

As to refusal.—If a banker, having presented to him within banking hours a cheque, bearing the genuine signature of a customer whose funds in the bank at the time are sufficient to pay the amount drawn for, refuse to pay, he is liable in substantial damages to the drawer; but it will be a good answer to *an action to recover damages*, if the banker can convince a jury that, although he had, in point of fact, funds of the drawer's in his hands at the time of presentment of the cheque, yet that such funds had not been paid in long enough to have been in his hands for a reasonable time before the presentment. What is a reasonable time before presentment must be ascertained by the jury in each case, by reference to its particular circumstances: *ex. gra.*, the general magnitude and extent of the business at the bank, the pressure of business at the time, or on the previous part of the day in question, &c., &c. (o).

Also it is a defence to such action, that the drawer's assets have been exhausted, by the payment of bills accepted by him, payable at the bankers; and it is not necessary for the bankers to show any special authority or any further order, than that contained in such acceptances, to enable them to pay the amounts due upon the bills (p), without giving a right of action for dishonouring cheques presented subsequently.

The following case (q) may serve to illustrate the principles above laid down. On a certain day A. had standing in his name at his bankers a balance of 69*l.* 16*s.* 6*d.* About one o'clock the same day 40*l.* was paid into his account;

(o) *Whitaker v. Bank of England*, 6 Car. & P. 700; 1 C. M. & R. 744; *Marzetti v. Williams*, 1 B. & Ad. 415.

(p) *Kymer v. Laurie*, 18 L. J., Q. B. 218.

(q) *Marzetti v. Williams*, 1 B. & Ad. 415; *S. P. Rolin v. Steward*, 14 C. B. 595; 23 L. J., C. P. 148. In *Rolin v. Steward*, which was an action against bankers by a trader having assets in their hands for dishonouring three cheques amounting in the aggregate to 111*l.* 13*s.*, and no special damage was proved, the jury gave 500*l.* damages. The Court suggested that the parties might relieve them from giving any ultimate opinion, but intimated they inclined to think the damages very large, whereupon it was agreed by the parties to reduce them to 200*l.*, and the judgment was entered up accordingly.

a little after three o'clock, a cheque drawn by him was presented for payment, the sum being 87*l.* 7*s.* 6*d.* A clerk, after referring to a book, said there were not sufficient assets, but that the cheque might probably go through the Clearing House. The cheque was paid on the following day. At the trial of an action, brought by A., against the bankers, no actual damage was proved to have been sustained by A., and the jury found a verdict for the plaintiff, with nominal damages; the Court, however, refused to grant a new trial, as the dishonour of the plaintiff's cheque by the bankers, having in their hands funds sufficient to meet it at the time, was of itself an actionable wrong entitling him to damages.

"I cannot forbear to observe," said Lord Tenterden, C. J., on the motion for a new trial, "that it is a discredit to a person, and therefore injurious, in fact, to have a draft refused payment for so small a sum; for it shows that the banker had very little confidence in the customer. It is an act particularly to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the bankers, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his cheques, and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages."

Where bankers had taken up bills for a customer on the security of the produce of certain consignments, and by a course of dealing with him had permitted him to draw on his account current with them without reference to their advances on the consignments, they cannot, by charging his account with the advances, in the absence of express notice, treat it as overdrawn, and accordingly dishonour his cheques before the consignments are realized (*r*).

(*r*) *Cumming v. Shand*, 5 H. & N. 95; 29 L. J., Exch. 129.

What are Banking Hours.—The Courts take judicial notice of what are banking hours in the city of London (s). What are banking hours in other parts of the metropolis, and in provincial towns, must be proved in each case in which the question becomes material (t).

Within what Time after it is received, by the Payee, a Cheque ought to be presented for Payment.—Somewhat different considerations arise in this respect, according to the character of the parties, between whom the question is raised.

1. *As between the payee and the drawer*, the rule is, that the drawer is not discharged, that is, the payee does not lose his remedy against the drawer, by reason of non-presentment within any prescribed time, short of six years after taking the cheque, unless the insolvency of the banker should take place in the interval; that is, unless an actual loss to the drawer, who has done nothing to cause the selection of him, as the one of the two parties, having no concern in bringing about the loss, on whom it is to fall. Between these parties, therefore, it is only in case of the intermediate insolvency of the banker that the cheque can become stale, all other circumstances remaining unaltered (u). Still the payee of the cheque must bear in mind, that he may be put to much trouble and inconvenience, by his neglect to present the cheque within a reasonable time (which is generally considered to mean within the banking hours of the day after it is received (x)), because bankers in general understand it as a rule of business not to pay old cheques without inquiry; also a banker cannot safely pay a cheque, the drawer of which has died,

(s) *Parker v. Gordon*, 7 East, 385; *Jameson v. Swinton*, 2 Taunt. 225.

(t) *Hare v. Henty*, 10 C. B., N. S. 365.

(u) *Alexander v. Burchfield*, 7 M. & G. 1067; *Serle v. Norton*, 2 M. & Rob. 401; *Laws v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76.

(x) *Boddington v. Schlencker*, 4 B. & Ad. 752; *Pocklington v. Sylvester*, Chitty on Bills, 346 (10th edit.); *Moule v. Brown*, 4 Bing. N. C. 268.

between the date of delivering the cheque and its presentment, because his death operates to withdraw the banker's authority to pay (*y*): also, although the drawer be still living, his account may have been overdrawn, or he may have ceased to have an account with the banker in the interval; and, in either of the three last cases, the payee might be obliged to resort to an action to recover the value. Again, the drawer might in the interval have become bankrupt or insolvent, in neither of which cases would it be probable that the payee would recover the full value.

On the other hand, although where the payee keeps the cheque, beyond a reasonable time, without presentment, and the bankers become insolvent in the mean time, the drawer is discharged; yet, if within banking hours of the day after he receives the cheque, the payee presents it, and finds that the bankers have become insolvent, between his receipt of the cheque and the carrying it for presentment, the drawer is not discharged, and the payee may recover; for here, though both parties are innocent, yet it is just that the payee should be paid his debt, the right to which he has done nothing to forfeit, since he has conformed to the strictest rule that applies to any holder of a cheque, by presenting in the course of the day after his receipt of it (*z*).

2. *When the person, who holds the cheque, is not the payee, but has received the cheque from the payee or from some intermediate holder, and upon the cheque being dishonoured seeks to recover from the person from whom he received it, the rule is strict that he must present it within*

(*y*) *Tate v. Hilbert*, 2 Ves. jun. 118. The banker would be justified in paying if, at the time, he had no knowledge of the death, *S. C.* In case of non-payment on the ground of the intervening death of the drawer, the holder might have relief in equity against the banker. *Rodick v. Gandell*, 12 Beav. 325; 1 De G. Mac. & G. 763.

(*z*) *Pocklington v. Sylvester*, Chitty on Bills 346 (10th edit.); *Boddington v. Schlencker*, 4 B. & Ad. 752.

banking hours, on the day following that on which he received it, at the farthest, provided there are the ordinary means of doing so (*a*). And the holder of a cheque, whether payee or other holder, does not obtain any more time by sending the cheque to his own bankers and presenting it through them; but in all cases, to be safe, he must present within banking hours of the day next after the day of the delivery of the cheque to him, whether he presents it himself or by a servant, or through his bankers (*b*). There is, of course, nothing to prevent the drawer agreeing with the payee to extend the time for presentment, by his assent, either express or implied (*b*). On the other hand, the payee, by transmitting a cheque on another bank to his own bankers, has not less time to present it in than he would have had, if he had kept it and presented it himself; and although the bankers do not send it to the Clearing House the same day, the drawer is not discharged (*c*).

Notwithstanding what has been stated above, from the decided authorities, founded on cases which have already come before the Courts, there can be no doubt that the drawer would not be discharged, if the payee could show, that although he had exceeded a reasonable time in presenting the cheque, still at no time between the delivery to him of the cheque and the stopping of the bank had the drawer assets in the bankers' hands to cover the amount of the cheque; or if he could show, that from the distance from the bankers at which he received the cheque, or the lateness of the hour or other circumstances, he could not have presented the cheque so as to anticipate the stopping of the bank, even though he had actually exceeded the prescribed period of the banking hours of the next day, &c. The payee does not lose his right to recover, as has been already observed, by the stoppage of the bank within the

(*a*) *Moule v. Brown*, 4 Bing. N. C. 268; *Robson v. Bennett*, 2 Taunt. 388.

(*b*) *Alexander v. Burchfield*, 7 M. & G. 1061; *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302.

(*c*) *Boddington v. Schlenker*, 4 B. & Ad. 752.

prescribed period, provided his presentment, though subsequent to the stoppage, is within the period. Also, if it could be shown, that the bank had stopped, to the drawer's knowledge, at the time of his delivery to the payee of the cheque, probably no actual presentment need be proved, in order to render the drawer liable. So the drawer would be held liable, if it could be proved that he had reduced his account with the banker, below the amount of the cheque, before the closing of the bank, on the day after his delivery of the cheque, or perhaps at any time before presentment (*d*).

With respect to the presentment of cheques on provincial bankers, the following case may be usefully detailed :—

A cheque for 4,374*l.* was given, on the 20th of April, in payment for an estate, to A., at Lutterworth, drawn on the Lutterworth bank. It was received, by the payee, after banking hours. A. lived three miles from Lutterworth, and he handed the cheque to B., to be carried to Rugby, and placed to H.'s account with the Rugby bank. Rugby is six miles from Lutterworth. On the arrival of the cheque at Rugby, the bank had closed, but the cheque was deposited, with one of the partners of that bank for the night, and in the morning of the 21st April it was paid into the bank, and on the same day was transmitted, by post as the most advisable mode, to the Lutterworth bank, with orders to send the amount to London. The Lutterworth bankers received it early on the 22nd, and at half-past one p.m. on that day, they stopped payment, without having cashed the cheque. A Court of Equity held that the deposit of the cheque, with the Rugby bankers, was a reasonable and proper course, on the part of A., and consequently that the presentment to the Lutterworth bank, was in time to prevent the cheque from becoming his cheque, and that

(*d*) *Boehm v. Stirling*, 7 T. R. 429. So if he had in the meantime ordered the bankers not to pay. *Watson v. Poulson*, 15 M. & W. 1111; *Robinson v. Hawksford*, 9 Q. B. 52.

the debt was still due to him. The Rugby bankers, it was considered, had the whole of the 22nd to present the cheque in (e). Here, looking to the various circumstances, it might well be considered that the payee did not receive the cheque until the 21st, for he did not receive it, so as to make it available, until that day, and he was entitled to pay it into his bankers, or to send it, with the intention that it should be deposited in the bank of Rugby for the night: as it would not there be exposed to many risks, to which it might have been liable in his own house; and then the bankers at Rugby had the whole of the next day, after their receipt of it, to present it in. Also, it will be observed, that the case falls within the first of the above rules; for supposing that the payee did not present the cheque, within the next day after that on which he received it, still the stoppage of the bank did not occur in the interval between the receipt of the cheque and the presentment, and consequently the drawer remained liable. This decision may, therefore, be rested on this latter principle, independently of the peculiar circumstances of the case. But probably the proper meaning of the strict rule, as to presentment by the bearer, is that the period of—"the day after the receipt of the cheque by the bearer"—only begins to run from the day on which it was first possible for him to have presented the cheque; so that if a person receives a cheque too late for presentment to-day, under no circumstances can he have less than the whole of to-morrow and the next day for presentment; in other words, that "day" means "day available for presentment;" otherwise a person who received a cheque on a Sunday, dated on that day, would only have the whole of Monday to present it in; and a person who received a cheque, after banking hours, on a Saturday, must bear the loss, if the banking house did not open on Monday. It would seem reasonable, however, to consider that he first received the cheque, in each case, on Monday before bank-

(e) *Bond v. Warden*, 1 Collyer, 583.

ing hours commenced, and that he had, therefore, the whole of Monday and Tuesday to present it in; and so if any other acknowledged public holiday intervened.

The following is a case of the same class as the one last detailed :—

On the 5th of April the defendant paid to the plaintiffs, who were bankers, a cheque drawn on the Maidstone bank; it was given to the plaintiffs at the time of the Tunbridge market, and they gave their own bank notes in exchange; they received it, at Tunbridge, some time before the post set out on the 5th. The plaintiffs kept it all the 5th and 6th, but sent it to Maidstone, by the carrier, on the morning of the 7th; the carrier reached Maidstone at nine o'clock on the 7th, but the Maidstone bank did not open on that day. If the cheque had been sent by the post, of the 6th, it would have reached Maidstone an hour earlier. At the trial, Gibbs, C. J., said, "The plaintiffs cannot recover; they have been guilty of laches: I will not say that it was not their duty to have sent off the cheque by the post of the 5th, but the extreme time, up to which they were justified in keeping it, was till the post of the 6th. They do not send it till the 7th. It does not matter when the carrier arrived; they must suffer for their negligence" (*f*).

The extreme time here mentioned, it will be observed, is limited in accordance with the latter part of the second rule, by which the bearer or holder of the cheque must present in the banking hours of the day after that on which he received it, *if there are the ordinary means of doing so*. In the above case the Judge seems to have declined saying expressly, that, considering the hurry of a market day, the bank was bound to have sent the cheque by the post of the 5th, (though, on the other hand, he would not lay it down that it was not their duty,) so as to have presented on the 6th; but, as they did not take the means of the post of the 6th, of making what may be called

(*f*) *Beeching v. —*, Holt, 315.

an inchoate presentment on the day after they received it, the loss arising from the stoppage of the Maidstone bank, in the interval between the receipt and presentment, fell upon them.

On a Friday, at nine o'clock p.m., B.'s son called at the residence of C.'s salesman, five miles from Blackburn, and paid him a cheque on a Liverpool banker. The salesman was ill at the time, but on the following Monday he handed the cheque to C. at his place of business at Blackburn, and it was sent off the same day by C. to his agents at Liverpool, and on Tuesday morning it was presented for payment at the bankers and refused: it was held, that there was no unreasonable loss of time in the presentment of the cheque (*g*).

We shall detail another case of this class.

The plaintiffs were bankers at Aylesbury. At noon, the 13th of June, they discounted for the defendant a cheque that he had received in payment, for cattle, from some salesman in Smithfield, London. It was drawn, in his favour, on Smith & Co., bankers, London. The post for London left Aylesbury at 6 p.m., but the plaintiffs did not send off the cheque by that day's post, but by a coach which started at 8 a.m. of the 14th. The cheque was inclosed to Praed & Co., bankers, Fleet Street, who received it between three and four o'clock the same day. They presented it at Smith & Co.'s about 11 a.m. on the 15th. The answer was, "No effects—must see the drawers." The action was for money had and received to recover the sum of 300*l.* paid by the plaintiffs on the cheque to the defendant, and they had a verdict (*h*). Here the defendant, choosing to discount the cheque in the country, was considered to have assented to that being done which was the usual and necessary course to procure payment of the cheque (*i*); and it appears to be the inva-

(*g*) *Firth v. Brooks*, 4 L. T., N. S., Q. B. 4.

(*h*) *Rickford v. Ridge*, 2 Camp. 537.

(*i*) *Alexander v. Burchfield*, 7 M. & G. 1061, 1066.

riable usage, in the city of London, for bankers not to present cheques, paid in by their customers, until the day following that on which they are received, unless drawn on bankers eastward of Temple Bar, being members of the Clearing House, in which case they are exchanged the same day (*i*).

A country banker, receiving from his customer a cheque for presentment drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but he has until post time of the next day for so doing (*k*). Therefore, where a cheque upon a bank at Lewes was paid on a Friday morning into a bank at Worthing, by a customer of such last-mentioned bank, to the credit of his account with that bank, presentment of the cheque for payment at the Lewes bank on the following Monday was held to be in time, as the Worthing banker was only bound to send it by Saturday's post to his agent at Lewes.

The following case may properly find a place here, though it is less closely connected with this part of our subject:—

On the 17th November, A. asked B. to give him change for a cheque for 10*l.* 10*s.*, drawn by C. on W. & Co., bankers, in whose hands C. had funds sufficient to cover the amount. B. gave the change, and kept the cheque till the 21st November, when he paid in into *his* bankers. On the 23rd November, W. & Co. stopped payment, without having cashed the cheque. On the evening of that day B. told A. that the cheque had been *returned*, not telling him that W. & Co. had stopped, which A. did not know. A. gave B. 5*l.* and an I O U for 5*l.* 10*s.* and took back the cheque. Held, that the suppression of the fact by B. that W. & Co. had stopped payment, amounted to such a fraud on A. as entitled him to recover

(*i*) *Alexander v. Burchfield*, 7 M. & G. 1061, 1066.

(*k*) *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302.

the 5*l.* as money had and received, and that to entitle him to do so it was not necessary that he should have given or tendered back the cheque to B., Lord Denman, C. J., saying, the cheque was not *returned*, in the ordinary sense of the word (*l*).

The Presentment must in general be made, not only within banking hours, but at the banking-house, of the bankers, on whom the cheque is drawn. But the institution called the Clearing House, and the practice of using it, which is now very general, if not universal, among the bankers of the metropolis, have introduced a small divergence from the rule. Since 1858, the country bankers too have very generally adopted the Clearing House, for the presentation and collection of cheques payable in different parts of the country (*m*).

The Clearing House is a large room fitted with drawers: each banker using the house has one of these, marked with his name or firm. In the morning and at half-past three o'clock in the afternoon of each week day, a clerk from each banker using the house attends, bringing with him the cheques on other banks that have been paid into his bank since last clearing; these he deposits in the drawers of the respective banks on which they are drawn; he then credits their accounts separately, with the different amounts of the cheques they have placed in his drawer, as against his bank. Balances are then struck from all the accounts, and the claims between the various banks transferred from one to another, until they are so wound up and mutually cancelled, that each clerk has only to settle, in cash, with two or three others, and thus, by means of comparatively small sums in money, the balances are immediately paid. When cheques are paid into a bank after clearing time (*n*), they are sent to the respective houses on

(*l*) *Billing v. Ries*, Car. & M. 26.

(*m*) *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302.

(*n*) See 4 B. & Ad. 754.

which they are drawn, when, if the bankers intend to pay them, they are "marked," which is understood as an engagement that they will be passed, or paid, at the Clearing House next day (*o*), and that they have priority before the cheques which come in on that day (*p*).

From this practice, as above detailed, it is obvious that a large portion of the cheques which are paid into banks in London by customers, in order that the amounts may be carried to their accounts as money, is never presented by such bankers, as bearers, at the banking houses on which they are drawn; but that, instead, is established the practice of placing them in the drawers at the Clearing House belonging to the latter banks. In other words, they are presented to the clerks of the latter, who attend at the Clearing House; and such presentment has been held to be sufficient (*q*).

The following case illustrates both branches of the practice with respect to cheques payable in the metropolis:—On September 11, between one and two o'clock, the plaintiff received from the defendant a cheque on the defendant's bankers, Bloxam & Co.; the plaintiff lodged the cheque at his bankers, Messrs. Harrison, a few minutes after four, and they presented it between five and six to Bloxam & Co., who marked it for payment. The practice was proved to be as above stated. On the 12th Harrisons' clerk took the cheque to the Clearing House, but no one attended on behalf of Bloxam & Co., who had stopped payment at nine that morning. The cheque was therefore treated as dishonoured. The plaintiff, in going with the cheque to Harrisons', passed Bloxam's banking house. The Court held the marking to be *similar* to the accepting of a bill; for it was an admission of assets, rendering the banker liable to pay, and the same thing as if the banker had written on

(*o*) M'Culloch, *Commerc. Dict. voc. Clearing House*; 4 B. & Ad. 753; *Warwick v. Rogers*, 5 M. & G. 348; *Robarts v. Tucker*, 16 Q. B. 570; *Bellamy v. Majoribanks*, 7 Exch. 389.

(*p*) *Robson v. Bennett*, 2 Taunt. 388; *Stevens v. Hill*, 5 Esp. 247.

(*q*) *Reynolds v. Chettle*, 2 Camp. 596.

the cheque, "We will pay this to-morrow at the Clearing House." Thus, the presenting it at that place is equivalent to presenting it at the banking house, and there were consequently no laches in the plaintiff or his bankers, and the plaintiff had judgment against the defendant (*r*). It will be observed that the Court term the marking "to be similar to the accepting of a bill." Now, however, the 1 & 2 Geo. IV. c. 78, s. 2, and 19 & 20 Vict. c. 97, s. 7, passed subsequently to this decision, enact, that no acceptance of an inland or a foreign bill of exchange shall be sufficient to charge any person, unless such acceptance is, in writing, on such bill. At the date of the decision the law had been held to be, that a *verbal* acceptance of a bill was binding (*s*). Hence that decision must not be taken as extending, at the present day, to make *any* marking an acceptance according to the requirements of the above statutes; such marking only as amounts to a writing will be so. Signature is not essential to the acceptance of a bill under the statutes; but if the word *accepted* be written on the bill, it is a question for the jury whether the word was intended as a definitive acceptance, or whether it was to be subsequently completed by signature (*t*). This has been ruled with respect to a bill of exchange. And, certainly, if it were proved that a banker had deliberately marked a cheque by the word "accepted," or even by the letter A., or by his initials, or by the initials of the names composing the firm, and it were shown to be the usage or practice of the firm to pay cheques so marked, the bearer could recover against the banker, who, after such marking, with the knowledge of the bearer, refused to pay.

If the bearer banks with the same bankers on whom the cheque is drawn, no promise to pay can be implied from the bankers receiving the cheque without observation, and

(*r*) *Robson v. Bennett*, 2 Taunt. 388.

(*s*) *Lumley v. Palmer*, 1 Stra. 1000; Hardw. 74.

(*t*) *Dufaur v. Oxenden*, 1 M. & Rob. 90; *Corlett v. Conway*, 5 M. & W. 655.

keeping it till the following day; for *primâ facie* they will be taken to have received it as agents to the bearer (*u*). At least they will be so where they had no funds of the drawer's in their hands at the time.

But where A. and B. severally kept accounts at the same bank, and A. paid in a cheque in his favour, drawn by B., who was at the time considerably indebted to the bank, and the bankers received the cheque without observation, and on the same day received monies on account of B., and paid cheques drawn by him, and on the next day received monies on his account, but in each case appropriated those monies to other claims upon B., and they had written to A. saying that they had not carried the cheque to his credit, but would retain it by them in the hope of its being provided for, and promised B. that they would pay it when they had funds; it was held, that A. might recover from the bankers the amount of the cheque, in an action for money had and received (*x*), the bankers having had funds of B.'s in their hands subsequently to the receipt of the cheque, sufficient to have paid it but for their appropriation of them to other claims on him.

The following case may properly close this part of the subject:—

Three customers of bank A. draw three several cheques upon it, and pay them away to creditors; all the three having, at the time, considerably overdrawn their respective accounts. These cheques came into the hands of another bank B., who mark them as paid (in other words cancel them), and enter the amounts to the debit of the drawers severally. B. remits to A. the cheques, inclosed in a printed circular, desiring the amount of them to be paid to the London correspondents of B. However, notwithstanding this circular, the practice between the two banks is, to pay one another's cheques, so far as circumstances permit, by remittances of notes of the bankers sending the cheques,

(*u*) *Boyd v. Emmerson*, 2 A. & E. 184.

(*x*) *Kilsby v. Williams*, 5 B. & A. 815.

directed to these bankers, the understanding being, however, that the cheques should be paid on the day on which they are received, or on the day following, either by such remittances, or by remittances according to the circular. A. gave B. credit on their books for the amount of the cheques, but stopped payment three days after receiving them, and without having made any payment or remittance in respect of them, knowing, at the time of receiving the cheques, that their bankruptcy was inevitable. The dates were as follows:—On the 14th of July the cheques were sent to A., who got them on the 15th (as it seems in the morning); through that day and the 16th, they went on doing business as usual; they never opened after the 16th. It seemed indisputable, that if the largest of the three cheques had been presented on that day, by a stranger, for payment over the counter, they would have paid it, because the drawer had given them security, sufficient to cover all he was previously in their debt, *plus* the amount of that cheque. The assignees of the firm A. obtain payment, from the customers, of the full amount of the cheques. Held, that B. was entitled to payment in full of the amount, out of the bankrupts' estate, and that A. ought either to have remitted the money on the 15th or the 16th to B., or to the London correspondents of B., or have returned the cheques to B. (*y*).

Presentation of Country Cheques through Clearing House.—Cheques on country bankers situate at a distance from each other, when intended for collection in London, are crossed with the name of a London banker to whom they are sent by post, and who presents them in regular course at the country Clearing House, to the London correspondent of the country banker, whose correspondent's name is printed on the cheques. The London agent of the country banker does not mark them at once, or, in other words, as with cheques upon a London banker, does

(*y*) *Ex parte Cole*, 3 M. D. & D. 189, 197.

not give credit for them, but he transmits them by the next post to the country banker, who advises his London agent, by return of post, to debit his account with the same, and the London agent thereupon gives a draft for the amount to the banker from whom he received the cheques. The country Clearing House is used as a convenient medium for the presentment of country cheques to the drawees (z).

A., a banker at Worthing, received from B., a customer, a cheque drawn upon C., a banker at Lewes, distant about eighteen miles from Worthing, on the morning of Friday, the 8th of July, 1859, and sent it that evening by post to his London correspondent, D., for presentment through the country Clearing House. D.'s clerk handed the cheque at the Clearing House, on the morning of Saturday, the 9th of July, to the clerk of E., the London correspondent of C., the drawer of the cheque, who sent it down by post of that evening to C., and it was held that the presentment was in due time (z).

The following is a recent case on the same subject:—

B., on Wednesday, the 6th of May, 1864, drew a cheque on his bankers, Morgan & Co., of Ross, Herefordshire, payable to Mr. Watkins, or bearer, with the memorandum at the foot, "London agents, Messrs. Barclay & Co." He paid the cheque on the same day to Watkins, in Monmouth, a post town ten miles from Ross; Watkins kept it from that day until Friday, when he paid it to the credit of his account at his bankers, Bailey & Co., Monmouth. They sent it by the post of Friday to the City Bank, their London agents, to be presented to the London agents of the Ross Bank, through the country Clearing House. The City Bank, on the following morning, accordingly presented it to Messrs. Barclay at the Clearing House, and were then informed that Morgan & Co. had closed their account with them on the Thursday preceding, and the City Bank then

(z) *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302.

sent it back by post to Morgan & Co., at Ross, where it arrived on Sunday morning, the 10th of May. Morgan & Co., however, kept it till the 15th, when it was returned by them to the City Bank, through the post, dishonoured. The City Bank received it on the 16th, and by the same day's post sent it to Bailey & Co., who, on the 19th, gave notice of its dishonour to the drawer. Morgan & Co. paid money over the counter and to country bankers by letter till the 13th, when they stopped payment. B., from the time he drew the cheque down to their stoppage, having a balance more than sufficient to cover the amount of the cheque. In an action on the cheque by Bailey & Co. against B., it was held, that there had been laches on the part of the holder in presenting or giving notice of its dishonour, and that the drawer was therefore discharged (a).

It was intimated by the Court that it was reasonable to send the cheque to the London agents of Morgan & Co., but that it ought to have been returned to Bailey & Co. when it was found that Barclay & Co. had ceased to be the agents of Morgan & Co.

Presentment by Post.—Sending a cheque in a letter by post to the drawee would seem to be a good presentment, but there ought to be a notice of dishonour if the money is not received by return of post (a).

Stale or overdue Cheques.—It is well settled, and may be regarded as a fixed rule, that the endorsee of an ordinary bill of exchange, or promissory note, takes it with the equities that attach to it in the hands of the person from whom he received it; but whether the bearer of a cheque is affected by the same rule, seems to have been laid down with some variation at different times.

In a case where a cheque for 50*l.* was casually lost by the payee, and it was tendered, five days after its date, in payment for goods at a shop, and the shopkeeper took it

(a) *Bailey v. Bodenham*, 10 L. T., N. S. 422; 12 W. R. 865—C. P.

and gave change out of it, and on the next day presented the cheque and received cash for it, and a verdict was found for the payee, in an action for money had and received against the shopkeeper; the Court treated cheques, on the same footing in this respect, as bills and notes, holding that the person tendering the cheque, not having any title, could not transfer a title (*b*). But in a later case, where a cheque had been fraudulently obtained from the drawer, and a trading firm, to whom it was handed, six days after date, had given cash for it, and afterwards presented it and received the amount at the banker's, the drawer failed to recover against the trading firm, in an action for money had and received, and it was said not to be true, as a matter of law, that a party taking a cheque overdue has it with the same title, and no other, as the person from whom he receives it, though the rule, it was allowed, was certainly so with respect to bills of exchange and promissory notes (*c*).

The rule is said, in a work of great authority (*d*), to be generally applicable to cheques on bankers, but that it will not apply to cheques which appear to have been issued long after their date. There is an obvious distinction between a bill or note having a fixed day for payment, which is taken when overdue, and a cheque found in circulation long after its date; in the first case, suspicion of necessity attaches; in the latter, suspicion may or may not justly arise, according to circumstances; whether it does, is for the jury to say; the staleness of a cheque may be a ground on which they may infer fraud; but there does not seem to be any rule of law which points out any given degree of staleness, as evidence conclusive on that point (*e*).

(*b*) *Down v. Halling*, 4 B. & C. 330.

(*c*) *Rothschild v. Corney*, 9 B. & C. 389, 391.

(*d*) Bayley on Bills, cap. v. s. 3, citing *Boehm v. Sterling*, 7 T. R. 423, where the Court says of cheques, that the equities of the parties are the same, as with regard to bills of exchange; but in *Serrell v. Derbyshire, &c., Railway Company*, 9 C. B. 811, the Court declined to decide the point.

(*e*) See *Dehors v. Harriott*, 1 Show. 164; *Brown v. Davies*, 3 T. R. 80; *Sturtevant v. Forde*, 4 Scott, N. R. 670; *per Parke, B.*, 9 M. & W. 17, 18.

So gross negligence may be considered, by the jury, to be shown in the circumstances under which a person takes a stale cheque as cash; viz., negligence of the duty, which those circumstances imposed upon him, of inquiring into the connexion between the bearer and the parties named on the cheque, and if he has been guilty of such negligence, they may consider him to have been a fraudulent taker; but no rule of law, it would appear, lays down, with respect to such a cheque, what has been formerly laid down in the case of a party taking a promissory note after the date at which it was made payable in the body of it; that the taking it, after it was due, is a suspicious circumstance, from which the law infers that the taker had knowledge of some infirmity in the title of the holder, and therefore takes it subject to all the objections to which it was liable in the hands of the person from whom he took it (*f*). On the contrary, it is now definitively settled, that if a man take *honestly* an instrument made payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted that is consistent with the idea of his honesty; his negligence may have been gross; the jury *may* thence infer his fraud; thus the proposition becomes altered, and of course the *fraudulent* taker of a cheque acquires no title. Still gross negligence *only* would not be held at the present day to be a sufficient answer, where the taker had given consideration. Gross negligence may be evidence of *mala fides*, but it is not the same thing (*g*).

Still there may be such gross negligence as to render bankers liable, without any imputation of fraud or *mala fides*; thus, where a customer's cheque was presented, which had evidently been torn in pieces, and pasted together again, the bankers having paid the cheque, were held liable to the drawer. Here the negligence consisted,

(*f*) *Amory v. Mereweather*, 2 B. & C. 578.

(*g*) *Goodman v. Harvey*, 4 A. & E. 870; *Uther v. Rich*, 10 A. & E. 784; Byles on Bills, 144 (8th edit.).

apparently, in want of inquiry, to see whether the drawer had not revoked the cheque, which its appearance indicated he had done (*h*).

When presentable for Payment.—Bankers are not justified in paying a cheque which is presented to them, before the day on which it purports to have been drawn, or bears date, for by so doing they may be liable to pay over again the amount of the cheque, *ex. gra.*, if it has been lost by the payee, the banker must repay him, it being out of the usual course of banking business to cash cheques before the day of the date (*i*).

On the other hand, no days of grace are allowed on the presentment of a cheque (*k*).

Cheques drawn by the Treasury on the Bank of England are not payable after three o'clock p.m. (*l*), and they usually bear a memorandum, to this effect, printed at the top of the paper on which they are drawn.

A cheque of the ordinary kind is strictly payable, or at least intended to be paid, immediately on demand; and this appears to be universally the case, with the exception of cheques drawn on bankers in the city of London, where the usage of trade establishes the rule, that a cheque may be retained by the banker, on whom it is drawn, until five o'clock p.m. of the day on which it is presented, and, if there be no assets, it may then be returned to the person presenting it, and that too, although it has been, in the first instance, by mistake cancelled, as intended to be honoured. Thus, where a plaintiff paid into the bank of V. & Co. a cheque drawn upon the defendant's house, and V.'s clerk took it to the Clearing House to be paid, and

(*h*) *Scholey v. Ramsbottom*, 2 Camp. 485, recognized in *Ingham v. Primrose*, 7 C. B., N. S. 82; 28 L. J., C. P. 294.

(*i*) *Da Silva v. Fuller*, Chitty on Bills, 180 (10th edit.), cited *per* Parke, B., in *Morley v. Culverwell*, 7 M. & W. 178.

(*k*) *Moyser v. Whitaker*, 9 B. & C. 409; *Sutton v. Toomer*, 7 B. & C. 416; *Dixon v. Nuttall*, 1 C., M. & R. 307.

(*l*) 4 & 5 Will. IV. c. 15, s. 21.

put it into the defendant's drawer, and received it back before five o'clock cancelled, but with a memorandum, *cancelled by mistake*(*m*), written under, and it was proved that several cheques drawn by the same person had been paid on that day, but that, when the cheque in question came in, the clerk who received it immediately cancelled it, thinking it was to be paid, but finding, in a few minutes, that no more of such cheques were to be paid, wrote the memorandum above mentioned, and it was returned to V.'s clerk accordingly. Held that, notwithstanding the cancelling, the defendant, according to the usage proved at the trial, had until five o'clock to return it, and that, having so returned it, this amounted to a refusal to pay (*n*).

Dispensation with Presentment. — Knowledge of the bankruptcy or stoppage of the banker, on whom a cheque is drawn, seems to be a dispensation with presentment (*o*); but the practice is for the holder to present the cheque (*p*).

Drawer's Bankruptcy. — The bankruptcy of the drawer has been already intimated to be a good ground of refusal, by the bankers, to honour his cheques. In fact bankers stand in no different position, as regards the laws of bankruptcy, than other persons; and, therefore, they are liable, like all other persons who pay money to a bankrupt, after knowledge of an act of bankruptcy, to be obliged to pay it over again to the assignees. Hence, if a banker, after knowledge of an act of bankruptcy com-

(*m*) See *per Buller, J., Leftley v. Mills*. 4 T. R. 175.

(*n*) *Fernandey v. Glynn*, 1 Camp. 426, n.

(*o*) *Camidge v. Allenby*, 6 B. & C. 373, as explained in *Robson v. Oliver*, 10 Q. B. 704; Byles on Bills, 187 (8th edit.).

(*p*) Knowledge of the bankruptcy of the drawee of a bill does not excuse presentment at maturity; Story on Bills, ss. 326—346; though, in the case of bankers who have stopped payment, it is forcibly put, in Byles on Bills, p. 187, that it cannot be necessary for the holders of the notes of a bank which has notoriously stopped payment, and is shut up, to go through the empty form of carrying their notes up to the bank doors and then carrying them home again.

mitted by a customer, nevertheless honours his cheques, the banker will be liable to repay the money to the bankrupt's assignees; for, knowing of the act of bankruptcy, the bankers have imputed to them the knowledge of the legal consequences of the act, which is, to render the party no longer a free agent and deprive him of the right to dispose of his property (*q*).

The only remedy of the assignees seems to be against the bankers; they cannot sue the creditor to whom the cheque was delivered and the money paid on it, he not knowing of any act of bankruptcy (*r*). Nor is it a valid excuse for the banker, that he pays to a creditor who does not know of the act of bankruptcy, to whom, therefore, a direct payment by the trader would stand good (*s*). At all events, if the assignees recover from the bankers the amount of a cheque, paid to a creditor of the trader, under the above circumstances, they cannot also recover it from the creditor, though the creditor, when he received the money, knew of the act of bankruptcy (*t*).

Crossed Cheques.—Previously to the alteration of the law of crossed cheques effected by the statutes hereinafter referred to, in the metropolis, and in many other places, it was a common practice for a person drawing a cheque, to write across the cheque the name of a banker, ordinarily the banker of the party in whose favour it was drawn. The *intention* of this was, to advertise the bankers upon whom the cheque was drawn, that they were to cash the cheque only to or in favour of the banker whose name so appeared written across the instrument; the reason for adopting the precaution was to prevent its being paid to a wrongful bearer, *ex. gra.*, one who had found it, or got possession of it by fraud or felony.

If, however, a cheque so crossed was handed to an-

(*q*) *Vernon v. Hankey*, 2 T. R. 119.

(*r*) *Mathew v. Sherwell*, 2 Taunt. 439; 1 Rose, 118.

(*s*) See *Vernon v. Hankey*, 2 T. R. 117.

(*t*) *Vernon v. Hankey*, 2 T. R. 287.

other person as bearer, there was no objection to his erasing the name of the banker that he found upon it, provided he substituted the name of another banker (*u*).

It was not unusual to write across a cheque ——— and Co., leaving a blank space on the left hand side of the word *and*, in order that it might be filled in with the name of the banker, through whom the payee, or any one to whom he might pass the cheque, intended that the cheque should be presented; and when so crossed, as in the former case, the banker on whom the cheque was drawn was in the habit, in London and other places, of refusing to cash the cheque, if presented otherwise than through *the* banker; and so if the blank were not filled up, the practice was, that it was only paid when presented through *some* banker (*x*).

It was decided that the crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, did not restrict the negotiability of the cheque to such banker or to a banker only; but in law it operated as a mere memorandum, that the holder was to present it for payment through some banker. Such crossing being made for the protection of the owner of the cheque, the payment of a crossed cheque, otherwise than through a banker, would be strong evidence of negligence, in case the person presenting proved not to be the lawful owner of it. If it was doubly crossed, that afforded no additional evidence against the banker, in an action by the drawer for money lent to him (*y*).

(*u*) *Stewart v. Lee*, M. & M. 158.

(*x*) Such crossing had not the effect of affecting the bankers whose name was written across it, and into whose bank it was paid, with knowledge that the sum mentioned in it was the money of the payee. Thus, when C. drew a cheque on his banker, payable to A. and B., assignees of P., and crossed it with the name of their bankers, with whom they had an account as assignees: B., who had a private account with the same bankers, paid in the cheque to that account; the Court held, that the bankers were justified in applying it to that account, because, according to the usage of trade and of bankers, the crossing with the name of the payee's bankers was no notification to them that the money was the money of the payee. *Stewart v. Lee*, M. & M. 158.

(*y*) *Bellamy v. Marjoribanks*, 7 Exch. 389; 21 L. J., Exch. 70.

There was, it was held, no obligation on a banker on whom a cheque was drawn, arising either from usage or otherwise, (in the absence of a special usage or a special agreement to that effect,) to pay a cheque only through the bankers, with whose name they found it crossed in their customer's handwriting; consequently they were not liable to an action at the suit of the drawer, as for a violation of duty, if they paid it otherwise, although the drawer might have been, in consequence of such payment by them, subject to a loss, at least in a case where the drawer gave opportunity to the fraud upon him, by making the cheque payable to a person who was never intended to take the money for himself, but was in truth a mere servant, to carry the cheque to the bank, with whose name the drawer had crossed the cheque, the payee having struck out that name, and crossed the cheque with the names of his own bankers, to whom the cheque was cashed, and from whom he obtained the proceeds (z).

The law was held to be, that, however general might be the practice of crossing cheques with the form "— & Co.," or with the name of a banker, the negotiability of a cheque payable to bearer was not thereby affected, so that

(z) The history, origin and legal effect of crossing cheques are stated in the judgment of the Court in *Bellamy v. Marjoribanks*, as follows:—

"The crossing a cheque cannot operate as an endorsement to the banker, whose name is used, because it was not written with any intent to transfer the property in the cheque to him, and it wants the essential part of an endorsement, the delivery of the instrument to the endorsee. And we think that it cannot be well supposed that the usage is to be considered as equivalent to the direction by the holder or drawer to the drawee, not to pay to the bearer, but to a particular person only—for then the cheque would be altered in a manner which would take it out of the exemption of the Stamp Act, 55 Geo. III. c. 184, Sched. 1, which applies to cheques payable to bearer only, and the bankers, to whom it was addressed, could not be bound to pay to the person named. We are, therefore, of opinion that a crossing the cheque, with the name of a banker, cannot have the effect of restricting its negotiability to such banker only. To hold it to have this effect, would be to render the instrument no longer a cheque.

"It was agreed, on all hands, that the practice of crossing cheques originated at the Clearing House; the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the Clearing House clerks to make up the accounts. It is quite clear that this had nothing whatever to do with the restriction of the negotiability, for, at the time when this was done, the cheques were in the course of payment or presentation for

any one who took such cheque, and *bonâ fide* gave value for it, was entitled to the money he got for it, through his bankers, from the bankers on whom it was drawn. Hence, if a person who received a cheque, crossed as above, in payment of a debt, sent it by his clerk to pay into his bankers, but the clerk, instead of doing so, got the amount from A. B., then, if A. B. acted *bonâ fide*, he was not liable to repay to the clerk's master the sum he got, through his bankers, for the cheque (a).

Such having been adjudged to be the law on this subject, the 19 & 20 Vict. c. 25, was first passed to alter it; we have stated the law as it was, because it is always indispensable to the clear understanding of a new rule, superseding an old one, to be accurately informed of the terms of the old one. That statute, after reciting that doubts had arisen as to the obligations of bankers with respect to cross-written drafts, and that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers, payable to bearer, or to order on demand, were

payment, and all their negotiability was at an end. The establishment of the Clearing House is comparatively modern, and was within the memory of several of the witnesses. It afterwards became a common practice to cross cheques which were not intended to go through the Clearing House at all, with the name of a banker, or with the words '— & Co.,' leaving the rest in blank, and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of such a custom, and we think that the great preponderance of evidence on both sides tended to show the custom to be that which is reported to have been stated by some of the jury in the case of *Stewart v. Lee*, M. & M. 158, namely, that, when a cheque is crossed, bankers generally refuse to pay it to any one except a banker, and if they do pay it to a person not a banker, they consider that they do it at their peril, in the event of the party to whom the payment is made not being entitled to receive it; that the object is to secure the payment, not to any particular banker, but to a banker, in order that it may be easily traced, for whose use the money was received; and that it was not intended thereby at all to restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit. We are strongly inclined to think, on a full inquiry, the usage will turn out to be no more than this; and, considering the custom in this point of view, the crossing is a mere memorandum on the face of the cheque, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such a usage is highly beneficial to the public."

(a) *Carlton v. Ireland*, 5 El. & Bl. 765; 25 L. J., Q. B. 113.

enabled effectually to direct the payment of the same to be made only to or through some banker, enacted, that in every case where a draft on any banker, made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words (and company), in full or abbreviated, either of such additions shall have the force of a direction to the bankers, upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker.

Shortly after the passing of this statute, the Court of Common Pleas and the Exchequer Chamber decided, that the proper construction to be put upon it was, that unless the crossing appeared on the face of the cheque at the time when it was presented for payment to the banker upon whom it was drawn, he was justified in paying the cheque to the bearer over the counter, although such bearer had come possessed of it wrongfully, and had for the purpose of enabling him to obtain payment erased the crossing (*b*). The crossing on the cheque was held not to be an integral part of the cheque, and consequently its erasure did not amount to a forgery. It was therefore enacted by the 21 & 22 Vict. c. 79, s. 1, that whenever a cheque or draft on any banker, payable to bearer or to order on demand, shall be issued, crossed with the name of a banker, or with two transverse lines with the words (and company), or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and, except as hereafter mentioned, shall not be obliterated, or added to, or altered, by any person whomsoever, after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or, if

(*b*) *Simmons v. Taylor*, 2 C. B., N. S. 528; 27 L. J., C. P. 45; affirmed on appeal, 4 C. B., N. S. 463.

the same is crossed without a banker's name, to any other than a banker.

Then by section 2, when a cheque or draft has been issued uncrossed, or is crossed with the words (and company), or any abbreviation thereof, and without the name of any banker, a lawful holder of the cheque or draft, while it remains uncrossed, or crossed with the words (and company), or any abbreviation thereof, without the name of any banker, may cross it with the name of a banker; and when a cheque or draft has been issued uncrossed, a lawful holder may cross it with the words (and company), or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated, or added to or altered, by any person whomsoever, after the making thereof; and the banker upon whom the cheque or draft has been drawn, shall not pay such cheque or draft to any other than the banker with whose name the cheque or draft shall be so crossed.

By sect. 3, persons obliterating, altering, or adding to, a crossing on a cheque or draft, with intent to defraud, will be guilty of felony (c).

Sect. 4, however, provides that a banker paying a cheque or draft, which does not, at the time when it is presented for payment, plainly appear to be or to have been crossed, or to have been obliterated, added to, or altered, shall not be in any way responsible or incur any liability, nor shall such payment be questioned by reason of such cheque having been so crossed, or having been obliterated, added to, or altered, and of his having paid the same to a person other than a banker, or other than the banker with whose name the cheque or draft shall have been so crossed, unless

(c) This section was repealed by the 24 & 25 Vict. c. 95, but re-enacted by the 24 & 25 Vict. c. 98, s. 25, defining the punishment on conviction to be penal servitude for life, or for three years (now by 27 & 28 Vict. c. 47, s. 2, not less than five years), or imprisonment for two years, with or without hard labour, and with or without solitary confinement.

the banker has acted *malâ fide*, or been guilty of negligence in paying the cheque.

When, therefore, a cheque is once crossed with the name of a banker, it is payable only through that banker, or when crossed with the words "& Co.," without a banker's name, it is payable only through some banker. Blank forms of cheques are often printed with the crossing "& Co.," and it is usual, in the City of London, when the payee requires cash, for the drawer to underwrite the crossing with the words "Pay cash," and sign it, and the banker cashes the cheque across the counter. The practice seems defensible, on the ground that the cheque has not been completely and irrevocably issued when the alteration is made by the drawer.

A French cheque drawn upon an English house is not recoverable against the French drawer, if the cheque should be stolen, and negotiated through the drawer having neglected to cross it(c).

Cashed Cheques.—Let us consider what is the proper mode of disposing of a cheque after it has been cashed.

By the 55 Geo. III. c. 184, s. 19, the banker must cancel it; but is the banker, or the drawer, entitled to its possession? We have seen that when a cheque is dishonoured, it is returned, in the technical phrase, with "no effects," or words to that effect, written upon it. When the banker hands back to the drawer of the cheque, after it has been cashed by the banker, this restoration is not known as a return of the cheque. In fact, however, such restoration always takes place; the banker's duty being to return the cheque, after cashing it, to the drawer. A banker has no more right to a cheque, which he has honoured, than the payee of a bill of exchange has, to the bill when paid. It is always considered that the cheque is the property of the drawer when paid(d), and in his possession;

(c) Imperial Court, Paris, 8th April, 1861, 2 Petersdorff's Abr. 125, 2nd edit.

(d) *Per* Wilde, C. J., in *Reg. v. Watts*, 2 Den. C. C. 21.

the banker, *for this purpose*, being his agent, the possession of the banker is therefore his possession (*e*); and therefore where the drawer is one of the parties to an action, a notice to produce is all that is necessary, to get the paid cheque before the Court (*f*).

This is the rule with respect to all cheques drawn in the usual mode.

There may, however, be instances where a cheque is drawn, with the intention, that it should remain in the banker's hands, after he has paid out the amount of it, as a kind of security for the repayment, on which he may be able, if necessary, to proceed against the customer. Such a case is the following:—Two brothers, A. and B., applied to a banker for a loan of 500*l.*; the banker agreed to lend the money, provided a third brother, C. would join them, in giving security for the advance; C. agreed to this; and, in pursuance of such arrangement, A., B. and C. signed a cheque in this form, "Pay selves or bearer £500. A. B. C.," and on delivery of this cheque, to the bank, 500*l.* was paid out to them. C. died, leaving A. and B. his executors. The banker sued A. and B., *as such executors*, for the amount due to him, in respect of principal and interest, on the cheque. The result was judgment by default, and execution, under which the sum of 28*l.* 5*s.* was levied on the goods of C. The widow of C. shortly, after his death, deposited with the banker, the title deeds of certain real estate of C., as security for the amount due on the cheque. A. and B. were both in distressed circumstances at this time, and possessed of no property whatever, and unable to pay what was due. Then a bill was filed in equity, by the banker, for an account of what was due, for principal and interest, against A. and B., praying that an account of the personal estate of C. might be taken, and if that should be found insufficient, then that the real estate, or a competent part of it, should be sold, and the

(*e*) *Partridge v. Coates*, R. & M. 156.

(*f*) *Burton v. Payne*, 2 Car. & P. 520.

debt paid out of the proceeds. For the banker, it was contended, that the liability created by borrowing the 500*l.* was joint and several, and consequently that the executors were liable to pay the sum due; but the Court held that the banker was not entitled to the relief claimed, and that such a cheque only showed a joint debt, and not a joint and several debt, if the case was put on the footing of the cheque itself, without reference to the consideration, whether C. were a surety or not. The Court also expressed a clear opinion that if an action had been brought, in the lifetime of C., against him alone, or against A. or B., it could not have been maintained, without breaking down the distinction between a joint debt and a joint and several debt (*g*). The banker was obviously ill-advised; he took a security which, as against the party to whom he gave credit, was practically unavailable; he ought to have taken a joint and several bond, or a joint and several promissory note (*h*), or C.'s guarantie, on any of which he might have recovered judgment, which would have bound the real property of C.

It may be observed that when a joint and several instrument is taken by bankers, as a security for a loan to a customer, who is one of the parties to the instrument, the other or others executing it as sureties, it may be well (and probably the practice is often so) that the bankers should expressly warn the latter parties, that they will be treated and considered, in all respects, as principals, in regard to liability on the instrument (*i*). Such a course is desirable, because it would preclude any prospect, in case the bankers were driven to sue such surety on the instrument, of a successful defence being made, by him, on the ground that he delivered the instrument to them, as surety merely, and

(*g*) *Other v. Iveson*, 24 L. J., Chanc. 654; 3 Drew. 177. The position in *Thorpe v. Jackson*, 2 Y. & C. 553, that a joint loan creates, in equity, a joint and several debt, was denied in *Jones v. Beach*, 2 De G. Mac. & G. 886.

(*h*) See *Pease v. Hirst*, 10 B. & C. 122; *Manley v. Boycott*, 22 L. J., Q. B. 265; 2 El. & Bl. 46.

(*i*) See *per Curiam*, 22 L. J., Q. B. 268; 2 El. & Bl. 56.

that they agreed to receive it, from him, as surety merely. Without such precaution there are circumstances in which such an answer to an action might, perhaps, be available; if the precaution is taken no circumstances can be imagined, in which it is at all probable, that such defence could succeed (i).

Reverting, then, to the subject of the right of the drawer to have sent back to him, by the bankers, all cheques drawn by him, on them, which they have paid, we come to inquire into the reason and object of the rule. Now the reason of the rule is immediately seen, when we consider that the cheque bearing the tokens of having been cashed, by the bankers, affords evidence, when produced, of the money, for which it is drawn, having been paid, according to the requirement of the drawer, by the drawees; it is, therefore, the drawer's proof, or voucher, of the payment of the debt, due to the payee of the cheque. When the drawer draws, on his own account, against his own monies deposited with the bankers, the cheque, in its cancelled state, is his evidence, against the payee, that the debt has been discharged. When the drawer draws on a fund, in the bankers', which he is specially empowered, in respect of some office or situation which he holds, to draw upon, it is his voucher, as against his constituents to whom the fund belongs, that their debt to the payee has been duly discharged. In either case equally, the cheque, or the piece of paper, is the property of the drawer (k).

Where a drawer of a cheque, after it had been paid and returned to him cancelled by his bankers, darkened the signature so as to give it the appearance of a forgery; he then took it to his bankers and represented it to them as the forgery of another person: it was held, that the alteration of his own cheque by the drawer, although a cheat on his bankers, was not a forgery (l).

(i) See *per Curiam*, 22 L. J., Q. B. 268; 2 El. & Bl. 56.

(k) *Reg. v. Watts*, 2 Den. C. C. 14, 22.

(l) *Brittain v. Bank of London*, 3 F. & F. 465; 11 W. R. 569.

A creditor, it has been observed, may always object to a cheque when offered as payment; but the decisions have gone farther than that, for if a creditor is offered in payment of his debt, either cash or a cheque upon *a* banker, from the agent of the debtor, who offers the payment, and the creditor prefers the cheque and it is dishonoured, this, of itself, does not discharge the debtor, although the agent fails with a balance of the principal's in his hands to a larger amount (*m*).

Where, however, a creditor takes a cheque drawn by an agent of the debtor, on *his* (the agent's) own bankers, in payment of a debt due to the creditor from the debtor (that he does so being unknown to the debtor), and also gives a receipt to the agent, as for the money due from the principal, in consequence of which the principal deals differently with the agent, on the faith of such receipt, the principal is discharged, although the cheque is afterwards dishonoured, the agent becoming insolvent. It is otherwise, however, if the principal does not show that he was injured, by means of such false voucher and the omission of the creditor to inform him of the truth in due time (*n*).

In this case we may perceive the presence of the principle, that where there is a loss and the question arises on which of two innocent parties is it to fall, the answer is, on that one of the two whose conduct has contributed to bring about the loss: but, in order to make the principle applicable, obviously it must first be shown, that *a loss* has actually occurred, and this would not be shown, in the above case, unless the principal proved that, on the agent's passing his accounts, he had had credit given him, as for the payment of this debt, on the ground of the receipt proving that it was discharged. If it were shown, however, it would manifestly be unjust that the principal should be obliged to pay the money over again.

(*m*) *Everett v. Collins*, 2 Camp. 515.

(*n*) *Wyatt v. Marquis of Hertford*, 3 East, 147.

Cheques as Evidence.—Where the plaintiff was tenant, and the defendant land steward, of a proprietor of land, and the defendant had received, from a railway company, a sum of money to be handed over to the plaintiff, as compensation for injury done to his temporary interest, as tenant, by the company's works, and the defendant had drawn a cheque, for 15*l.*, upon his bankers, in favour of the plaintiff, which the plaintiff had presented to the bankers, and got the cash for from them; but there was no evidence that the cheque had been delivered, by the defendant, to the plaintiff: held, notwithstanding this, that the cheque, upon being produced by the defendant, in a cancelled state, was evidence of the payment to the plaintiff of the 15*l.* (o). Here, it will be observed, there was independent evidence to establish the fact of money being due from the defendant to the plaintiff: without a consideration for delivering the cheque, and the circumstances under which it is delivered, are shown, the proof of the delivery and payment of a cheque to a party is not sufficient to prove a *debt* (p); so that to produce a cheque drawn by the defendant is not an admissible mode of enforcing against him an alleged *debt* due to the plaintiff. But the production of a cancelled cheque, after it has been shown *aliunde*, that there was due from the drawer a debt to the plaintiff, before the date of the delivery to him of the cheque drawn in his favour, is always evidence of payment, without explicitly tracing the cheque from the drawer to the payee. To prove a payment, it is enough to put in evidence a cheque shown to have been in circulation (q).

Another instance of the value of cancelled cheques, as evidence, is the following:—On a certain day A. had a claim, to a certain amount, on B., C. and D., partners. Many months afterwards, B. signed a cheque for a larger

(o) *Mountford v. Harper*, 16 M. & W. 825; 16 L. J., Exch. 182.

(p) *Aubert v. Walsh*, 4 Taunt. 293; *Lloyd v. Sandilands*, Gow, 15, as corrected, *per Alderson*, B., 16 M. & W. 827.

(q) *Thompson v. Pitman*, 1 F. & F. 339.

sum, in the name of himself and C. and D., which was proved to have passed through A.'s hands, and to have been appropriated by him. In an action by A.'s executors against the partners for the original claim, it was held that the cheque was *primâ facie* evidence of payment; but there being other circumstances, from which a loan for its amount might be inferred, it was left to the jury to say whether the cheque represented a loan from B. alone or from the partnership (r).

It may be convenient to add here some further instances in which cheques are available in evidence.

Many bankers are in the habit of supplying their customers with printed forms, in blank, of cheques, which is convenient for the customers, as saving time and trouble, and is also useful for both parties, as increasing the difficulty of forging or altering cheques. It is also not unusual, upon a change in the firm of a banking house, which adopts this practice, to alter the printed form of the cheques accordingly, and to supply to their customers the altered form, in order that it may be used by them, for the future, instead of the old one. Such alteration in the name and style of the firm, when made in the printed form supplied, has been held, at *Nisi Prius*, to constitute a sufficient notification of the change to a customer, to whom the altered form has been delivered, and who has used it in drawing cheques (s).

The Bank of England requires their customers to use the engraved forms of cheques, which they supply, otherwise they refuse to pay the cheques (t).

A cheque has been shown, upon the authority of various decisions, to be admissible, when cancelled, *as evidence of payment*, the existence of the debt, and other circumstances relating to the giving of the cheque, being previously established; but it is not, therefore, to be concluded that the

(r) *Boswell v. Smith*, 6 Car. & P. 60.

(s) *Barfoot v. Goodall*, 3 Camp. 147.

(t) See 6 Car. & P. 730.

drawing of a cheque in favour of a creditor by the debtor, and the delivery of it to the former, operate *per se* as payment, for a cheque is not money (*u*), nor is it a legal tender; the creditor may always object to it as payment, and if he has done so, when it was delivered to him, he may sue for the original debt, although he retains the cheque (*x*). But there is this difference in the case of payment by a draft on the debtor's banker, accepted by the banker and payable after so many days' sight; there the creditor cannot sue before the expiration of the period, not having returned the draft to the debtor, because the assets of the debtor in the hands of the banker are bound to the extent of the draft, which sum the debtor cannot withdraw (*y*).

It has, on various occasions, been made a question, at what period an attorney's bill of costs was paid, in consequence of the 6 & 7 Vict. c. 73, s. 21, restricting an application to tax his bill to be made within twelve months after payment; and where bills of exchange or promissory notes having some time to run have been given in payment, the twelve months have been held to commence from the time when the bills or notes were honoured, not from the time when they were given, unless they were treated by the parties as payment when given (*z*); and the same would, in all probability, be held in the case of a cheque, if ever the delay of the payee to present it for payment should have made the interval, between the delivery of the cheque to him and the cashing it, wide enough to make it worth while to raise the question. But, as every consideration that can be imagined would operate to accelerate the presentment of the cheque, it is very unlikely that in practice the case should arise.

With respect to the Statute of Limitations, it has been held, that when a bill of exchange or promissory note has been given, in part payment of a debt, under such circum-

(*u*) *Moore v. Barthrup*, 1 B. & C. 5.

(*x*) *Hough v. May*, 4 A. & E. 954.

(*y*) *Stuart v. Cawse*, 28 L. J., C. P. 193; 5 C. B., N. S. 737.

(*z*) *Sayer v. Wagstaff*, 5 Beav. 415; *In re Harries*, 13 M. & W. 3.

stances as to raise the implication of a promise to pay the balance, the defence of the Statute of Limitations is answered, as from the time of such delivery of the negotiable security, whatever afterwards becomes of it (*a*). The question in the case deciding this point was, whether a bill of exchange, drawn by the creditor and accepted by the debtor in part payment of an antecedent debt, was sufficient to take the case out of the statute, and the Court determined that it was, and upon principles and reasoning which seem to apply equally to part payment by a cheque.

Where, however, a purchaser, at a sale, gives a cheque for the amount of the deposit required by the conditions of sale, he may resist an action, on the cheque, on any grounds which would have enabled him to recover, at law, the deposit, if it had been made in money (*b*).

Again, to establish a petitioning creditor's debt, it is not enough to show that a cheque was drawn by him in favour of the trader, before the bankruptcy; it must be proved that the amount of the cheque was paid by the petitioning creditor's bankers (*c*). As the *mere* drawing of a cheque, on his bankers, by A. in favour of B., is not *per se* evidence of a loan of so much from A. to B., neither is a cheque drawn by B. on his bankers in favour of A., without proof that it was presented and paid, evidence of debt, for money lent by A. to B. (*d*).

Also, as we have seen, the ordinary relation of customer and banker is that of creditor and debtor respectively, consequently, where a banker is the petitioning creditor, the production of cancelled cheques, drawn on him by the trader before the bankruptcy, is *prima facie* evidence of a payment of a debt due from the banker to the customer, not of a loan made by the banker to him, nor can such effect of this evidence be countervailed, and the existence of a loan established, so as to constitute a petitioning cre-

(*a*) *Turney v. Dodwell*, 23 L. J., Q. B. 137; 3 El. & Bl. 136.

(*b*) *Mills v. Oddy*, 6 Car. & P. 735; 2 C., M. & R. 103.

(*c*) *Bleasby v. Crossley*, 3 Bing. 430.

(*d*) *Pearce v. Davis*, 1 M. & Rob. 365.

ditor's debt, without the clearest proof that the trader's account with the bank was overdrawn at the time the cheques were honoured (e). It does not appear to have been contended, in this case, that the circumstance of the banker having retained, in his own hands, these cashed cheques, contrary to the practice in the case of cheques drawn in ordinary circumstances, and the trader's submitting to the banker doing so, in contravention of what would have been his right, if the cheques had been drawn in the ordinary course, was evidence to show a loan from the banker. The banker, in that case, would have a right to retain the cheques, because to part with them would be to put beyond his control the only conclusive evidence he might have of the loan, beyond the entries in his own books corresponding with the cheques, which would be perhaps open to the objection, that to let them in would be to allow the making of evidence in a man's own favour.

In all cases of loans to customers, some security, independent of cheques of the character of those just mentioned, ought, if possible, to be taken by the banker.

As an act of Bankruptcy.—With respect to the operation of a cheque as constituting an act of bankruptcy, where a firm, having formed the resolution to stop payment, on the same day draws cheques on their bankers, in favour of certain creditors (one of whom was their solicitor, who had not sent in his bill,) without any pressure, and giving these creditors time to carry their cheques to the bank, and get cash for them, in about half an hour after drawing and delivering the cheques sends word to the bankers to pay no more cheques on account of the firm: it was held, in equity, that this was the transfer of a debt due from the bankers to the firm; that is, that it was a transfer of money, and so was within 6 Geo. IV. c. 16, s. 3, which

(e) *Fletcher v. Manning*, 12 M. & W. 579, where the cheques were retained by the banker; as in *Other v. Iveson*, 3 Drew. 177; 24 L. J., Chanc. 654, as the banker's evidences of a loan.

made any fraudulent transfer or delivery of any of the trader's goods and chattels, with intent to defeat or delay creditors, an act of bankruptcy ; for that money might well be considered to come within the meaning of " goods " in that section (*f*) ; and such a transaction would probably be considered, at the present day, to be a fraudulent preference, under the circumstances, and not to be protected by the 133rd section of the Bankrupt Act of 1849, but to fall within the proviso of that section, and to be invalid as " a payment."

As a Fraudulent Preference.—The following transaction was held not to amount to a fraudulent preference:—

A. & Co. are bankers, in an embarrassed condition, and about to stop payment. B., who is father-in-law of A., has a private account with the bank ; he is also one of the managing directors of an assurance company, who also bank with A. & Co.

A. mentions the embarrassed state of the bank to B.'s son, telling him the bank would shortly stop payment ; and it was then agreed between them that B.'s private balance, amounting to about 2,000*l.*, should be drawn out ; but A. desired that B. would not give any information of the matter to a certain shareholder of the company, as he, A., did not wish the directors to know anything about it. In consequence of this information, B.'s private account was drawn out the following day, which was Monday. In the evening of that day A. saw B., and informed him of the state of the house, and that they could not go on beyond Wednesday then next. B. in consequence filled up a cheque for the amount of the company's account (about 8,000*l.*), and sent his son with it to another of the directors, by whom it was signed, and on the following morning presented and cashed. On the Wednesday A. & Co. stopped payment and became bankrupts. In an action by their assignees against the secretary of the assurance

(*f*) *Ex parte Simpson*, 1 De Gex, 9 ; 14 L. J., Bank. 1.

company, to recover the above sum, as paid by way of fraudulent preference, the jury, on the above facts, found that it never was the intention of the bankrupts (none of whom but A. knew of the communication) that B. should draw out the company's balance, but only his own; and found a verdict for the defendant; and the Court held there was no fraudulent preference, and nothing more than an ordinary payment on a cheque (g).

In this case the fraudulent preference seems, in truth, to have consisted in the communication to B.; and if the assignees had sued B., they would probably have recovered the 2,000*l.*, which he drew out in consequence of such information; but the Court considered it to be carrying the doctrine of fraudulent preference too far, to lay down that, notwithstanding a man's declared intention contradicting any design of fraudulent preference, if, in consequence of any act of his, any other person obtains a preference, *that* will render the transaction fraudulent: they considered that no previous decisions warranted them in so deciding. Perhaps, however, it is to be regretted that a new trial was not granted in that case, so that it might have been seen whether a second jury would have been convinced, that a banker who communicates to the son of a director of a company that the bank is about to stop, and then tells the father the same, really intends the matter to remain a secret from the directors, although he may declare he does. The case appears to open the way to indirect modes of effecting fraudulent preferences, by seeming to pronounce that nothing but a direct transaction between the bankrupt and the creditor preferred can form such a preference.

It is well known that the legal aspect of a preference is not altered by the fact, that the creditor preferred may have the strongest claims upon the gratitude of the firm. Thus, where a person on the 6th July, 1772, to whom a bank already owed 1,300*l.*, paid in 7,000*l.* to his ac-

(g) *Belcher v. Jones*, 2 M. & W. 258.

count, which he had borrowed in order to help them, telling them he should not draw the money out until the Friday following; then, at five o'clock on the morning of the 9th, one of the firm encloses two promissory notes, his own separate property, to the amount of 17,202*l.* 18*s.* 4*d.*, to the creditor, and absconds to France before the letter reaches its destination, and is made bankrupt; the assignees were held entitled to recover the notes in trover, the transaction being a manifest fraudulent preference, and a void transaction for want of the creditor's assent. The absconding partner owed more to the firm than the amount of the two notes (*h*).

A bank being indorsee of bills on which a trader had forged acceptances, he, in contemplation of bankruptcy, took up these bills without any pressure being made by the bank. The trader became a bankrupt, and it was held, that the payment to the bank was a fraudulent preference (*i*).

Notice of act of Bankruptcy.—Another class of cases affecting bankers, with reference to the proof of debts in bankruptcy, arises on the question of their knowledge of an act of bankruptcy previously committed to cashing a cheque of the bankrupt.

The expression "notice of an act of bankruptcy," in the 12 & 13 Vict. c. 106, s. 133, has been construed to mean a general notice of an accomplished act of bankruptcy (*k*); but the act must be complete; notice that something is going on, out of which perhaps an act of bankruptcy may result, is not sufficient (*l*); and notice of an act of bankruptcy given to the Bank of England, in London, is notice to their branch banks, at all events from the time when information of it might be transmitted to the branches (*m*).

(*h*) *Harman v. Fisher*, Cowp. 117.

(*i*) *Ex parte Hibernian Bank*, 14 Ir. Chanc. Rep. 113.

(*k*) *Udal v. Walton*, 14 M. & W. 254; *Turner v. Hardcastle*, 11 C. B., N. S. 683.

(*l*) *Conway v. Nall*, 1 C. B. 643.

(*m*) *Willis v. Bank of England*, 4 A. & E. 21.

The time here mentioned probably means, time in the ordinary course of post; at least, before the invention of electric telegraphs, it has been held, that in cases of notice of dishonour, and similar cases, it was enough to transmit the information in course of post; and at present it remains undecided, the question never having arisen before the Courts, whether the Bank would be bound to send word by telegraph.

The case first mentioned of a trader drawing cheques on his bankers, after an act of bankruptcy, was, where his account was overdrawn at the time; and it has been before mentioned, that if bankers, knowing of an act of bankruptcy of a customer having funds in their hands, honour his cheques, they are liable to the assignees of the customer, on his becoming bankrupt, for the amount they have paid out to such orders (*n*).

Bankers stopping Payment.—As to the operation of a cheque drawn after stoppage of payment by bankers, where A. and B., partners, had a joint account with bankers; A. had also a separate account. On the 22nd April the bankers announce a suspension of payment, and that they could not answer any more cheques. At that time, A. and B. were indebted, on the joint account, 333*l.* to the bank, but the bank was indebted to A., on his separate account, 478*l.* After this no cash payments were made by the bank. On the 25th May, A. assigned the balance of 478*l.*, due to him, to the joint account of A. and B., and gave a written notice to the bankers of such assignment, and A. and B. jointly required the bankers to place such balance to their joint account. This was not complied with. On the 30th May, an act of bankruptcy was committed by the bankers, on which the fiat issued on the 31st. The Court of Chancery considered A. and B. to have no right to set off the two debts, their conduct showing, that though they knew they could not obtain pay-

(*n*) *Vernon v. Hankey*, 2 T. R. 113.

ment of a cheque, they had attempted to have the full benefit of a cheque (o).

Cheques as Money.—By the usage of trade cheques have been, in some cases, considered as money. For instance, by the usage of banking, if a bill was sent up to a London banker from a country correspondent, to be presented for payment, the London banker was thought to be justified in receiving a cheque in payment for it, though the cheque be dishonoured after he has given up the bill (p); but it may be doubted whether this usage would be considered, at the present day, to be a reasonable usage, so as to protect the London banker.

Another case in which a cheque has been regarded as payment is the following:—A cheque given for stock sold is lost by the vendor in going home; the purchaser is immediately apprised of this, but refuses to pay the price of the stock without an indemnity. Four months after this the bankers on whom the cheque was drawn fail, with sufficient money of the drawer's in their hands to cover it. Held that, under these circumstances, an action would not lie by the vendor for the price (q).

Cheques belonging to a person, against whose effects a writ of *fiери facias* may have been sued out of any superior or inferior Court, may now, and must, be seized by the sheriff, by virtue of the 1 & 2 Vict. c. 110, s. 12, but the statute makes a distinction between cheques, and money or bank notes (both of which it empowers and orders the sheriff to seize), in this way: it directs that money and bank notes shall be given up to the judgment creditor, but the sheriff is to hold cheques as a security for the sum directed by the writ to be levied, and is enabled to sue upon them, and the payment by the party liable on such cheque, with or without suit, or the recovery and

(o) *Watts v. Christie*, 11 Beav. 546; 26 L. J., Chanc. 711.

(p) *Russell v. Hankey*, 6 T. R. 12; *Ridley v. Blackett*, Peake, Add. Cas. 62.

(q) *Bevan v. Hill*, 2 Camp. 381.

levying execution against the party so liable, is to discharge such party from his liability on the cheque, and then the sheriff is to pay over the money so recovered to the judgment creditor: provided that no sheriff shall be bound to sue upon such cheque, unless the judgment creditor shall enter into an indemnity bond with two sureties, &c.

The following decisions upon the right to seize cheques under an execution may be usefully brought to the reader's attention:—

A judgment creditor, finding that a sum of money was about to be paid out, in a cause in Chancery, to his debtor, applied to the Court to order that the sheriff might be at liberty to seize, in the hands of the Accountant-General in Chancery, a cheque by means of which the sum was to be paid out: it was held, that the cheque was liable, by virtue of the above statute, to seizure: it was also held, that, inasmuch as the cheque was in the hands of the Accountant-General of the Court, the application was proper (*r*); that is, that it would not have been proper for the sheriff to seize without being authorized by an order of the Court.

In another case, subsequent to this, it was said that a cheque of the Accountant-General in favour of A., but not delivered out, is not A.'s property, so as to be liable to seizure; and leave to seize was refused, the case being, it was said, distinguishable from the last-mentioned case, by the circumstance that the cheque had been delivered out by the Accountant-General in the former case, which was not so in the latter; a stop order was accordingly granted, restraining the Accountant-General from parting with the cheque out of his possession (*s*). It may be observed, with respect to the distinction taken between the two cases, that, in the first case, the cheque had been delivered out, but had been replaced in the Accountant-General's hands, so that, the property in it having passed to the creditor,

(*r*) *Watts v. Jefferies*, 3 Mac. & G. 422.

(*s*) *Courtoy v. Vincent*, 15 Beav. 486.

the Accountant-General held it as agent for the creditor, and the possession of the agent being the possession of the principal, it might be seized in the hands of the one, on the same grounds that it might be seized in the hands of the other.

A cheque may have been treated throughout a transaction as money by all the parties, in which case no one of them can turn round and insist upon any right that he might have derived out of the cheque, considered as an order for the payment of money. Thus, if, in such circumstances, a cheque were deposited with a person to abide a certain event, it would be no breach of the stakeholder's duty to get the cheque cashed before the occurrence of the event (*t*).

Where there has been any fraud on the party giving a cheque, then, although the creditor, at the time, took the cheque as payment, it will not be considered as money; thus, if A. gives B., in payment for goods, a cheque which A. has no reasonable ground to expect will be paid, no property in the goods passes to A., and B. may sue in trover, or he may affirm the contract, and sue for the price of the goods (*u*).

A cheque drawn by A., in favour of B. as a gift, cannot, according to the general principle that there must be a consideration for an undertaking not under seal, be enforced by B. in an action against A. (*x*). A cheque may be the subject of a good *donatio mortis causâ* (*y*), especially if the payee gets it cashed before the drawer's death, or after his death, if before the banker has notice of the death (*z*).

When a cheque is handed to a person, on a condition, and the money is got by him for the cheque, but the con-

(*t*) *Wilkinson v. Godefroy*, 9 A. & E. 536.

(*u*) *Hawse v. Crowe*, R. & M. 414; *Noble v. Adams*, 7 Taunt. 59; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514.

(*x*) *Easton v. Pratchett*, 1 C. M. & R. 808.

(*y*) *Boutts v. Ellis*, 4 De G., Mac. & G. 249; 17 Jur., N. S. 405, 585.

(*z*) *Tate v. Hilbert*, 2 Ves. jun. 111; *Reddell v. Dobsee*, 3 Jur. 722; 10 Sim. 244.

dition is not performed, the money may be recovered by the drawer (*a*). But if A., by means of a false pretence or a promise, or a condition which he does not fulfil, procures B. to give him a cheque in favour of C., to whom he pays it, and who receives it *bonâ fide* for value, B. remains liable on it, and, if cashed by C., he cannot recover the money from him (*b*).

A banker has no right to debit the customer, who draws a cheque, from the date at which it is drawn; he is bound to make the entry, as of the date when the cheque was cashed (*c*).

Cheques are analogous to Bills of Exchange.—Cheques are, by recent legislation imposing a stamp duty upon them, and creating a class payable to order, nearly on the same footing as bills of exchange; and the decisions of the Courts have been of late in favour of putting them on the same footing as to their general legal incidents and characteristics. Cheques, though not usually, may be accepted by the banker (*d*). They pass as well by delivery as by indorsement (*d*); a holder is affected by the same equities and infirmities as attach to the title of holders of bills of exchange (*e*). Cheques are within the Bills of Exchange Act, 1855, (18 & 19 Vict. c. 67), by which a summary mode of proceeding to recover upon them is provided by that statute (*f*). The Courts, on various occasions, have pointed out differences and analogies existing between the rules and principles applicable to cheques and bills of exchange. Thus, no days of grace are allowed with respect to cheques, which are always to be cashed speedily, if not immediately (*g*); the payee of a cheque

(*a*) *Wienholt v. Spitta*, 3 Camp. 376; see *Spincer v. Spincer*, 2 M. & G. 295.

(*b*) *Watson v. Russell*, 3 B. & S. 34; 31 L. J., Q. B. 304.

(*c*) *Goodbody v. Foster*, cited in Byles on Bills, 25 (8th edit.).

(*d*) *Keene v. Beard*, 8 C. B., N. S. 372, 380.

(*e*) *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161; *Watson v. Russell*, 3 B. & S. 40.

(*f*) *Eyre v. Waller*, 5 H. & N. 460; 29 L. J., Exch. 246.

(*g*) Story on Promissory Notes, ss. 489, 490; Chitty on Bills, 261 (10th edit.); it was not until upwards of eighty years had elapsed after the date of

does not obtain, on a cheque, any more time for presentment by employing a banker to make it, while in the case of a bill of exchange, by the custom of merchants, the holder obtains a day more for giving notice of dishonour, by presenting it through a banker, than if he presented the bill himself (*g*); also, the death of the drawer of a cheque rescinds the banker's authority to pay it; the death of the drawer of a bill of exchange has no operation to diminish or alter the nature of the responsibilities of the other parties to it (*h*).

In another respect a cheque differs from a bill of exchange,—it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange (*i*).

There is another difference between the two instruments; in the case of a bill of exchange, the drawer is discharged by default of a due presentment to the acceptor; but in the case of a cheque, the drawer is not discharged by a delay in the presentment, unless it be shown that he has been prejudiced thereby; for instance, by the failure of the banker on whom it is drawn (*i*).

A cheque is not due before payment is demanded, and in this respect differs from all such bills of exchange as are payable on a fixed day (*k*).

In one respect, there appears to be no difference between a bill of exchange and a cheque, as regards pleading:

3 & 4 Anne, c. 9, putting promissory notes on the same footing as bills of exchange, that the Courts, after some oscillation, finally decided days of grace to be allowable on promissory notes, as well as on bills of exchange. *Brown v. Harraden*, 4 T. R. 148, A.D. 1791.

(*g*) *Alexander v. Burchfield*, 7 M. & G. 1060.

(*h*) *Billing v. Devaux*, 3 M. & G. 571, 572, 573.

(*i*) *Keene v. Beard*, 8 C. B., N. S. 372, 381; 29 L. J., C. P. 287, 290, per Byles, J.; and see several points of difference pointed out by Tindal, C. J., and Maule, J., in *Warwick v. Rogers*, 5 M. & G. 363; and by Parke, B., in *Ramchurn Mullick v. Luchmeechund Radakissen*, 9 Moore, P. C. C. 48, 69, and in *Serle v. Norton*, 2 M. & Rob. 404, n.

(*k*) *Per Lord Kenyon*, C. J., *Boehm v. Sterling*, 7 T. R. 430; *Alexander v. Burchfield*, 7 M. & G. 1067.

namely, that in an action by an indorsee against the drawer of the one, or by payee against the drawer of the other, the defendant may equally allege, as a ground why non-payment has not been notified to the drawer, that the plaintiff has sustained no damage by reason of such want of notice (*l*).

Persons entitled to sue.—The bearer of a cheque is the person entitled to receive the money therein specified, and he may transfer it to any other person; and whoever has possession of it, as bearer, may maintain an action upon it (*m*). A cheque payable to bearer may be indorsed, so as to entitle a holder to sue the indorser thereon (*n*).

As regards Crimes and Offences in relation to Cheques—Cheating by means of.—For a person to give what purports to be his cheque upon his banker, in payment for goods, when in truth he has no account with the banker named, is a false pretence within the 24 & 25 Vict. c. 96, s. 88 (*o*). So, where a prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, whereby he obtained a watch and chain, and the jury found that before the completion of the transaction—of the sale and delivery of the watch and chain, by the prosecutor, to the prisoner—he represented, to the prosecutor, that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false, and that he represented that the cheque would be paid on or after the day of the date, but he had in reality no funds to pay it, the prisoner was held to be properly convicted (*p*).

(*l*) *Thomas v. Fenton*, 5 D. & L. 28; *Kemble v. Mills*, 1 M. & G. 757; 9 Dowl. 446.

(*m*) *Per Martin, B.*, in *Ancona v. Marks*, 7 H. & N. 696.

(*n*) *Keene v. Beard*, 8 C. B., N. S. 372; 29 L. J., C. P. 287.

(*o*) *Rex v. Jackson*, 3 Camp. 370.

(*p*) *Rex v. Parker*, 2 Mood. C. C. 1; 2 Russ. C. & M. 298.

It is no false pretence, as regards the banker, to draw on and present to him a cheque for a larger amount than you have in his hands (*p*). A. drew a bill on B., on whom he had no right to draw, in order to induce bankers to honour his cheque, which they did; and it was holden not to be a false pretence, because A. only obtained credit, and not any specific sum on the bill (*q*).

Stealing.—A stock broker received from the prosecutor a cheque upon his banker, to purchase exchequer bills for him; the broker cashed the cheque and absconded with the money. Upon an indictment for stealing the cheque and the proceeds of it, it was holden to be no larceny (*r*). When a servant, by false pretences, induced his master to give him a cheque, as agent of a creditor of his master, with the view of its being handed over to that creditor, and the servant afterwards appropriated the cheque to his own use, he could not be indicted for stealing it (*s*).

But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and the defendant appropriated it to his own use, this was holden by the judges to be a larceny of the cheque (*t*).

Forging.—A person may be indicted for forging a cheque as “an order for the payment of money” under 11 Geo. IV. & 1 Will. IV. c. 66, s. 4 (24 & 25 Vict. c. 98, s. 39, has been substituted for this enactment). If the charge, in the indictment, is for forging a warrant and order, proof of a document which is a warrant but not an

(*p*) *Per* Maule, J., in *Reg. v. Garrett*, 23 L. J., M. C. 22.

(*q*) *Rex v. Wavell*, 1 Mood. C. C. 224.

(*r*) *Rex v. Walsh*, R. & R. 215.

(*s*) *Reg. v. Essex*, 1 D. & B. C. C. 371; 27 L. J., M. C. 20.

(*t*) *Reg. v. Metcalfe*, 1 Mood. C. C. 433; *Reg. v. Heath*, 2 Mood. C. C. 33; *Reg. v. Johnson*, 21 L. J., M. C. 473.

order for the payment of money, will not support the indictment (*u*).

A cheque of a railway company, signed by the secretary, addressed to their bankers, directed the latter to pay to A. a shareholder, or his order, the sum therein mentioned. There was a memorandum at the bottom of the document, "The shareholder's name must be indorsed at the back of the cheque:" it was held, that a person who forged the shareholder's indorsement on the cheque was guilty of forging an order or warrant for the payment of money (*v*).

A cheque, although post-dated, is a warrant and order for the payment of money (*w*).

Where an instrument is, in any respect, incomplete, and therefore not operative, as where the practice was, for a majority of the officers of a parish to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for £1 : 3s. 6d., had a note at the bottom,—“ Unless this cheque is signed by a majority of the parish officers, it will not be cashed.” This cheque was signed by one of the officers while it was for £1 : 3s. 6d.; it was then altered to £3 : 3s. 6d., and when cashed, by the treasurer, had the signatures of a majority of the officers to it: it was held, that if the cheque was fraudulently altered when it had only one signature to it, this was no forgery (*x*).

A cheque on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, is a warrant or order withing the meaning of the act, for it imports, upon the face of it, to be an order by a person having authority to make it (*y*). So, a draft forged in the name of a person who *does* keep cash with the banker is

(*u*) *Reg. v. Williams*, 2 Car. & K. 51. Filling a form of cheque, already signed, with blanks left in it for the sum, is forgery. *Flower v. Shaw*, 2 Car. & K. 703. So, filling in a blank cheque with a larger sum than that authorized by the drawer, is a forgery. *Reg. v. Wilson*, 17 L. J., M. C. 82.

(*v*) *Reg. v. Autey*, 1 D. & B. C. C. 294; 26 L. J., M. C. 190.

(*w*) *Reg. v. Taylor*, 1 Car. & K. 213.

(*x*) *Reg. v. Turpin*, 2 Car. & K. 820.

(*y*) *Rex v. Lockett*, 1 Leach, 94; *Rex v. Abraham*, 2 East, P. C. 941.

an order within the act, whatever may be the state of his account at the time (z).

On an indictment for uttering a forged cheque, it is not necessary to call the supposed maker to disprove an authority from him to any other person to sign in his name; it is sufficient to disprove the handwriting (a).

Unstamped Cheques in Criminal Matters.—In criminal proceedings, a cheque, although it may not have a stamp impressed thereon, or affixed thereto, is admissible in evidence under the 17 & 18 Vict. c. 83, s. 27.

Will.—A cheque may be admitted to probate, as a paper, of a testamentary character (b).

Cancellation of Cheques or Stamps thereon.—Cancellation of a cheque is imperative on the banker upon payment; and any banker, who refuses or neglects to cancel the same, is liable to a penalty of 50*l.* (c).

So, cancellation of the stamp upon a cheque is obligatory, under a penalty of 10*l.*, upon the person issuing or negotiating a cheque having an adhesive stamp thereon (d).

When a bill of exchange, draft or order is presented with an adhesive stamp for payment, the person paying must write or impress upon the stamp the word "Paid," to the end that it may be cancelled and made incapable of being used again; in default of so doing he is liable to a penalty of 20*l.* (e).

(z) *Reg. v. Carter*, 1 Den. C. C. 65; 1 Car. & K. 741.

(a) *Reg. v. Harley*, 2 M. & Rob. 473.

(b) *Walsh v. Gladstone*, 1 Ph. 294; *Heming v. Clutterbuck*, 1 Bligh, N. S. 479; *Brine v. Ferrier*, 7 Sim. 549.

(c) 55 Geo. III. c. 184, s. 19.

(d) 16 & 17 Vict. c. 59, s. 4.

(e) 23 Vict. c. 15, s. 12.

CHAPTER III.

LETTERS OF CREDIT AND CIRCULAR NOTES.

A LETTER of credit is an instrument, in common use among bankers, for the transmission of money either within the United Kingdom or to the colonies, or to foreign countries (*a*). It is not negotiable as a cheque, but is only an authority from the banker, who signs it, to the banker, or other person, to whom it is addressed, upon advice, to honour the drafts of the person named in it, and who produces the letter; and consequently he alone is entitled to draw the drafts or receive payment.

If the letter is stolen, or lost, and the banker, upon whom the letter of credit is drawn, honours the drafts or pays the amount upon a forged signature, he is not thereby discharged; neither is the banker granting the letter of credit (*b*). But the remedy is against the banker by the person who paid the money to him for the letter of credit (*b*).

Where a letter of credit had been issued by bankers in this country in favour of Mr. Robert Thomas, with a request to honour his draft for the amount therein mentioned, and was addressed to their agents, the Oriental Bank Corporation, Melbourne, in Australia, and a person who wrongfully obtained possession of it, and presented it with a forged indorsement of the payee to a banker in this country to get cashed or collected for him, was indicted for forging and uttering an order. At the trial evidence was given that, according to banking practice in this country, a

(*a*) Chitty on Bills, 350 (10th edit.); Story on Bills, ss. 459—463 (4th edit.).

(*b*) *Orr v. Union Bank of Scotland*, 1 Macq. H. L. Cas. 513; 2 C. L. R. 1566; *British Linen Company v. Caledonian Insurance Company*, 4 Macq. H. L. Cas. 107.

letter of credit of the above description was usually paid on the simple indorsement of the payee, but whether it would be so paid at Melbourne was not shown; though, according to usage, on the presentation of the letter of credit at Melbourne, the bank there would take pains to ascertain the identity of the person credited, and, on being satisfied, would credit him to that amount, and, in the terms of the letter of credit, would honour the draft of the party to the extent of the letter of credit.

It was objected, on behalf of the prisoner, that the indorsement was not shown to be an order, and Bramwell, B., said, "It is quite true that, if the bank at Melbourne chose to pay such a letter on the simple indorsement of the person credited, the latter could not afterwards oblige the bank to pay him a second time. But the letter of credit was directed to the Oriental Bank at Melbourne, who were to 'honour the draft' of 'Robert Thomas.' I think the simple indorsement in this country is not an order, not being within the original mandate, and I must direct the jury to acquit the prisoner. Perhaps," the learned judge added, "the prisoner might be indicted for the misdemeanor, of attempting to obtain the money by false pretences" (c).

The 16 & 17 Vict. c. 59, s. 19, which absolves bankers from liability, when they honour cheques upon forged indorsements of the payees, does not apply to letters of credit (d).

By 16 & 17 Vict. c. 59, [Schedule,] all documents or writings usually termed letters of credit, entitling any person, to whom the same are sent or delivered, to have credit with, or in account with, or to draw upon any other person for or to receive from such other person any money therein mentioned, are chargeable with the stamp duty of one penny, imposed by that statute upon drafts payable to

(c) *Reg. v. Wilton*, 1 F. & F. 391.

(d) *British Linen Company v. Caledonian Insurance Company*, 4 Macq. H. L. Cas. 107; *Hare v. Copland*, 13 Ir. Com. Law Rep. 426.

order on demand ; but letters of credit, whether drawn in sets or not, which are sent by persons in the United Kingdom to persons abroad, authorizing drafts on the United Kingdom, are exempt. The duty, when payable on letters of credit, may be denoted either by an impressed or an adhesive stamp.

Circular notes are similar instruments, drawn by bankers in this country upon their foreign correspondents, in favour of persons travelling abroad (*e*). The persons in whose favour these notes are granted usually carry with them a letter containing their signature, for exhibition to the correspondents on presentation of the notes, and for comparison with the signature, which the holders are required to give before payment, in order to satisfy the correspondents of their identity.

A., having a circular letter of credit for 210*l.* from a banker at New York, authorizing him to draw for that sum on the Union Bank of London, in favour of certain named correspondents abroad, went to St. Petersburg, and having fraudulently altered the figures in the letter of credit, so as to make it appear to be a letter of credit for 5,210*l.*, presented it, so altered, to W. & Co., of St. Petersburg, the correspondents there, and drew in their favour, on the Union Bank, a draft for 1,200*l.* This draft was cashed for A. by W. & Co., who sent it to London for presentation at the Union Bank ; but the Bank, discovering the fraud, refused to pay it. It was held that A. was not indictable for attempting to obtain the 1,200*l.* by false pretences (*f*).

(*e*) *Hare v. Copland*, 13 Ir. Com. Law Rep. 443.

(*f*) *Reg. v. Garrett*, 23 L. J., M. C. 20 ; see 24 & 25 Vict. c. 96, s. 89, which would seem to alter the law in this respect, and make the obtaining money, under the above circumstances, an indictable offence.

CHAPTER IV.

BILLS OF EXCHANGE PAYABLE AT BANKERS.

WE will next pass to the consideration of the duties of bankers, and their liabilities and rights, as regards bills of exchange, made payable at their banking houses.

Formerly, it was for a long time much disputed whether a bill of exchange drawn generally, but accepted payable at a particular place named on it, ought to be presented at that place, in order to ground a cause of action by the holder against the acceptor. At length this doubt was set at rest by a decision of the House of Lords, which declared the law to be, that an acceptance made payable at a specified place was a qualified acceptance, which imposed upon the holder, in an action against the acceptor, the necessity of stating and proving presentment at that place, in order to recover on the bill (*a*). The legislature, however, thought this part of the law required some alteration, and accordingly the statute 1 & 2 Geo. IV. c. 78, was passed, enacting, that an acceptance payable, on the face of it, at the house of a banker or other place, shall be considered to be a general acceptance, unless it be expressed to be payable there *only, and not otherwise or elsewhere* (*b*). The statute, it is to be observed, only mentions acceptances; it has been decided that a drawer cannot

(*a*) *Rowe v. Young*, 2 B. & B. 165; 2 Bligh, 391.

(*b*) The holder of a draft may refuse to take a special acceptance and resort to the drawer at once. *Gammon v. Schmoll*, 5 Taunt. 353. A person who takes a qualified acceptance is bound to give notice to the drawer; for *non constat* that he will assent to the qualified acceptance, see 9 M. & W. 509. A draft accepted payable at a banker's is not a special or qualified acceptance, and is generally esteemed of higher commercial credit, than a special or qualified acceptance, or an acceptance not made payable at a banker's.

render the bill payable only at a particular place, by stating it to be so, in the body of the instrument, so that a bill made by the drawer, payable at a particular place, is nevertheless accepted generally, unless the acceptor accepts it in the above terms, saying, that it shall be paid at that place only, and not otherwise or elsewhere (c).

Since the statute there are three different modes (as to two of them, however, differing chiefly in form,) in which a bill may be accepted; 1, generally; 2, payable at a banker's named; 3, payable at a particular banker's only, or not otherwise or elsewhere (d). Now, if the drawee accepts generally, there can be no doubt he undertakes generally to pay the bill, at maturity, when presented to himself; if he accepts in the second form, then the holder has the option either of presenting to the acceptor himself, or at the banker's specified, and that within banking hours; for in that case the acceptor's undertaking is to pay the bill, at maturity, on its being presented in either way; if the acceptor adopts the third mode, then, of course, he excludes the holder from any other mode of presentment, than to the banker named, and that within banking hours (e). Hence, in suing an acceptor of a bill accepted, payable at a banker's, in the second mode, it is not necessary to allege or prove presentment there (e). In suing the *drawer*, or an indorser, however, the case is different; for, in respect to such an action, it is still necessary, *if the bill is accepted*, payable at a banker's named by the acceptor,

(c) *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511; *Fayle v. Bird*, 6 B. & C. 531.

(d) It will suffice to accept payable at such a bank, "and not otherwise," without adding "only." *Higgins v. Nichols*, 7 Dowl. 551.

(e) *Halstead v. Skelton*, 5 Q. B. 92; *Bailey v. Porter*, 14 M. & W. 44. There is no objection, in declaring in an action against an acceptor, to a statement that the bill is accepted payable at a particular banker's, though, in fact, the acceptance is in the second form. *Blake v. Beaumont*, 4 M. & G. 7; 1 Dowl. (N. S.) 697. That the presentment must be made within banking hours, see *Parker v. Gordon*, 7 East, 385; *Whitaker v. Bank of England*, 1 C. M. & R. 744; *Wilkins v. Jadis*, 2 B. & Ad. 188; it may be made after, if the bank is not shut, or if any one is left to say if there are no orders. *Garnett v. Woodcock*, 6 M. & S. 44.

to prove presentment there (*f*); so if made payable in the body at a banker's, and accepted generally (*f*); and if the bill is *drawn*, payable at a particular place, in order to charge the *drawer*, or an indorser, it is necessary to show a presentment at that place; for such must have been the case before the statute, and the statute was not intended to alter, and has not altered, the liability of drawers or indorsers of bills of exchange; it is confined in its operation to acceptances alone (*g*).

If a bill of exchange is accepted, payable at bankers', and, in the course of business, is indorsed to the bankers, they, on suing the indorser, have no need to show that they presented it to the acceptor; for, as the bankers, at whose house the bill was to be paid, were themselves the holders of it, it was a sufficient demand, for them to turn to their books, and ascertain the state of the acceptor's account with them, and a sufficient refusal, to find that he had no effects in their hands (*h*); and a letter, written on the day when the bill became due to the indorser, on behalf of the bankers, stating the acceptor's bill to be unpaid, and requesting the indorser's immediate attention to it, is sufficient notice of dishonour (*h*).

Precisely the same has been laid down, as the law with respect to a promissory note, stated by the maker, in a *memorandum* to be payable at a banker's, to whom it became indorsed in the course of business, and who sued the indorser (*i*).

The drawer of a bill of exchange, accepted generally (subsequently to the passing of the 1 & 2 Geo. IV. c. 78), added the words "payable at R. & Co.'s, bankers, London," without the knowledge of the acceptor, and then indorsed it for valuable consideration, the bill being overdue, and the indorsee privy to the alteration. The acceptor

(*f*) *Gibb v. Mather*, 8 Bing. 214; 2 C. & J. 254; *Saul v. Jones*, 1 El. & Bl. 59; 28 L. J., Q. B. 37.

(*g*) See *Boydell v. Harkness*, 3 C. B. 168; 4 D. & L. 179.

(*h*) *Bailey v. Porter*, 14 M. & W. 44.

(*i*) *Saunderson v. Judge*, 2 H. Bl. 509.

was held to be discharged; notwithstanding the argument which was pressed, that, since the statute, this was only a general acceptance, and that no demand was necessary against the acceptor, and that, consequently, in an action by the indorsee against the acceptor, it was not possible to contend that he was prejudiced (*k*).

A bill is accepted, payable at a bank, which is also that of the drawer; the drawer discounts it with them, and indorses to them; they rediscount, and, on maturity, pay it, without indicating to the holder whether they pay as indorsers, or as agents for the acceptor. The acceptor's account being overdrawn, the bank give notice of dishonour to the drawer, and he is debited with the amount. It was held, they had a right to pay the bill as indorsers, taking time to inquire if they would honour the bill or not (*l*).

Again, where a drawer, after getting a bill accepted, payable at his bankers, kept the bill by him for some years, during which period the bankers became bankrupt, and then having erased their names, and substituted the name of another banker, without the knowledge of the acceptor, indorsed the bill, it was decided that the acceptor was discharged, the alteration being considered to be material (*m*).

A bill of exchange was accepted "payable on giving up bill of lading for seventy-six bags of clover seed per Amazon, at the London and Westminster Bank, Borough Branch:" it was recently held that this was a conditional acceptance to this extent, that the holder was only entitled to receive the amount on delivering over to the acceptor the bill of lading, but that he was not bound to present the bill on the precise day on which it became due, and consequently that the acceptor was not released from his liability (*n*).

(*k*) *Mackintosh v. Haydon*, R. & M. 362; see *Burchfield v. Moore*, 23 L. J., Q. B. 261; 3 El. & Bl. 683.

(*l*) *Pollard v. Ogden*, 2 El. & Bl. 459.

(*m*) *Tidmarsh v. Grover*, 1 M. & S. 735.

(*n*) *Smith v. Vertue*, 9 C. B., N. S. 214; 30 L. J., C. P. 56.

The effect of returning a bill, accepted payable at the acceptor's bankers, to the indorsee's bankers, at the Clearing House, with "orders not to pay" written on it, and "cancelled by mistake" also, is to disable the indorsee to recover, against the bankers, as for money had and received (*o*).

If a bill be accepted, payable at a particular town, presentment, it is said, at all the banking houses in the town is sufficient (*p*).

If a bill be accepted, payable at a particular place, the acceptance, as before shown, is general; it is, therefore, unnecessary to state anything about the place in declaring in an action against the drawer; such presentment, as the form of acceptance requires, being only matter of evidence; it is also, in some cases, objectionable to state the special acceptance, for if the special acceptance be stated, then, on suing the drawer or indorser, it may become necessary to state such presentment as the acceptance requires, and the omission to do so might be taken advantage of; though it would not, perhaps, be available after verdict (*q*).

If a bill is made payable at a particular bank by the acceptor, then, in an action by indorser against drawer, it is not necessary to allege a presentment *to the acceptor* at the bank; it has been decided to be enough to aver the presentment to have been made there (*r*).

Where a bill is accepted payable at a banker's, and the acceptor's address also appears on the bill, the holder has not the option of presenting either at the place named in the address or the place named in the acceptance; to charge the drawer or an indorser, he must present at the place indicated by the acceptance, viz., at the particular banker's mentioned (*s*); and if the holder presents at the bank, and is refused payment, he may sue the other parties

(*o*) *Warwick v. Rogers*, 5 M. & G. 340.

(*p*) *Hardy v. Woodrooffe*, 2 Stark. 319.

(*q*) *Lyon v. Holt*, 5 M. & W. 250; *Parker v. Ade*, 1 C. & M. 429; see *Wilmot v. Williams*, 7 M. & G. 1017; *Boydell v. Harkness*, 3 C. B. 168; 4 D. & L. 179.

(*r*) *Shelton v. Braithwaite*, 8 M. & W. 252.

(*s*) *Saul v. Jones*, 1 El. & Bl. 59; 28 L. J., Q. B. 37.

to the bill without any other presentment (*t*). But the acceptor, having funds to meet the bill in the bankers' hands, is, nevertheless, not apparently exonerated, if they fail after the maturity of the bill, but before it has been presented (*u*), although the holder is in default.

A bill, dated September 8th, 1856, was drawn on B. & Co., payable in London at four months after date. It was accepted as follows: "Accepted payable at Messrs. Overend, Gurney & Co., London. No. 1756. Due 11th Dec., 1856. B. & Co.:" it was held, that the words "Due 11th Dec., 1856," did not qualify the acceptance, but were, at most, an inaccurate description of the date of the bill (*x*).

A person who accepts a bill, payable at his bankers', is held thereby to give authority to the bankers to apply to the payment of it any funds of his in their hands, and there is no necessity for them to have any other or more specific authorization than the terms of the acceptance itself (*y*). The like authority would also be given to pay a promissory note which the customer has made payable at his bankers'. But from what has already been laid down, to the effect that bankers are bound to know the handwriting of their customer, and what is not his handwriting, it is manifest they would not be exonerated if they paid the bill or note, and it turned out that the bill or note was forged (*z*).

Bill, to whom payable.—But to whom does the acceptor authorize and order his bankers to pay? Is it to the lawful holder, or to whom, that the law merchant justifies the banker in paying the amount? The answer is, the banker

(*t*) *Mackintosh v. Haydon*, R. & M. 362; *Hankey v. Berwick*, 4 Bing. 135.

(*u*) *Rhodes v. Gent*, 5 B. & A. 246; *Sebag v. Abitbol*, 4 M. & S. 462; *Turner v. Haydon*, 4 B. & C. 1.

(*x*) *Fanshawe v. Peet*, 2 H. & N. 1; 26 L. J., Exch. 314.

(*y*) *Kymer v. Laurie*, 18 L. J., Q. B. 218. The bankers cannot sue on the bill, for it is *functus officio*, by the law merchant, when once paid by or on the behalf of the acceptor, and it cannot be re-issued, by the express provision of 55 Geo. III. c. 184, s. 19, under a penalty of 50*l*.

(*z*) *Smith v. Mercer*, 6 Taunt. 76; 1 Marsh. 453; *Woods v. Thiedemann*, 1 H. & C. 478.

is justified in paying, not merely to a lawful holder, but to any one who can give him a lawful discharge, according to the law merchant. Therefore a banker paying a bill, accepted by a customer as above, but bearing an indorsement purporting to be in the handwriting of the payee, but being, in fact, a forgery, and being accepted after this and other indorsements had been made on the bill, and presented at the Clearing House by a banking firm, who were indorsees, was not, it has been held, justified, by reason of such forged indorsement, in paying to the holder or indorsee, who could not give a legal discharge, and consequently the banker could not debit the account of the acceptor with the sum paid, but must himself bear the loss (*a*).

If, when a person accepts a bill payable at his bankers', his account with them is in such a state, as not to be adequate to pay the whole amount for which the bill is accepted, and they pay the whole amount, for the honour of their customer, they would be entitled to recover from the customer the difference between the amount of his monies in their hands, and the sum in the bill, either as so much money lent to him, or paid for his use. But in order to recover the amount, the bankers must prove the indorsement by the payee, as well as the acceptance by their customer; if either is a forgery, they will not be entitled (*b*).

A banker, receiving a sum for the express purpose of taking up a bill made payable at his bank, without objection at the time, cannot apply it to discharge the amount by which the customer paying in the money has overdrawn his account, nor ought he to pay cheques, drawn subsequently to the bill, before he pays it (*c*).

Bill when paid.—Next, when is a bill made payable at a banker's said to be paid? Now, in a case of a contract

(*a*) *Tucker v. Robarts*, 16 Q. B. 560.

(*b*) *Forster v. Clements*, 2 Camp. 17.

(*c*) *De Bernales v. Fuller*, 14 East, 590, n.

to pay money, that can only properly be called payment, which is payment according to, and in the terms of, the contract (*d*); so that payment, by a stranger, does not discharge the party contracting to pay, unless made by the stranger, as his agent, and with his prior authority or subsequent ratification. Hence, payment, by a stranger, of the amount of a bill of exchange, to the bankers, at whose house it was made payable by the acceptance, under an arrangement with them, whereby the person paying obtained possession of the bill, for a collateral purpose of his own, is not a payment of the bill by the acceptor (*e*).

Caution as to paying.—The facts and the decision upon them, about to be stated, furnish proof, if any be required, of the extreme caution which bankers are bound, in order to protect themselves, to exercise, in the payment of bills accepted by customers payable at their banking house.

A bill, purporting to be accepted by a customer payable at his bankers', was presented to them and paid. The bankers, on the following day, discovered the acceptance to be a forgery, and demanded back the money, from the holder, to whom they had paid it; but it was laid down by the Court, that the holder was entitled to know, on the day on which the bill became due, whether it was honoured or dishonoured, and that, no notice of the forgery having been given him on the day the bill became due, the bankers could not recover. Moreover, the Court expressly abstained from pronouncing any opinion whether, if notice of the forgery had been given to the party, to whom payment had been made, at a later period of the day on which the payment was made, so as to enable him to send notice to the prior parties on that day, the bankers would have been entitled to recover (*f*).

(*d*) *Simpson v. Eggington*, 24 L. J., Exch. 313; 10 Exch. 845; *Church v. Bishop*, 2 Ves. sen. 272; *Hopper's case*, 2 Leon. 110; *Smith v. Craven*, 1 C. & J. 500.

(*e*) *Deacon v. Stodhart*, 2 M. & G. 317; see *Cook v. Lister*, 13 C. B., N. S. 543; 32 L. J., C. P. 121.

(*f*) *Cocks v. Masterman*, 9 B. & C. 902, 908.

Where a banker only discounts, for a third party, a bill, purporting to be accepted by a customer, it is different, it seems : and, upon finding out the forgery (it has been held,) that the banker may recover from the third person (*g*).

Cancellation of Bills.—A bill was accepted, payable at Ladbroke's, with a direction written on it, in case of need, to apply at Boldero's. The bill was dishonoured at Ladbroke's, and thereupon brought to Boldero's. He, thinking it had been made payable at his house, under that mistake, cancelled the acceptance, but presently observed his mistake, and wrote under it these words,—*cancelled by mistake*, and signed his initials. Nevertheless, he paid the bill, for the honour of the plaintiffs, whose indorsement was on the bill : they were held entitled to recover, upon the bill, against a prior indorser (*h*) ; so that the mistake did not render the bill a nullity between those parties to it.

As a cancellation, by mistake, of an acceptance, does not bind ; so, as is well known, an acceptance may be retracted, provided it has not previously been communicated to the holder of the bill, although the acceptance was not originally given by mistake, but with the intention of really paying the bill at maturity (*i*).

Protested Bills.—A customer upon whom a bill has been drawn, payable at his bankers', remits money to them, to meet and take up the bill, two days after it became due ; the bankers, on tendering the money to the holder of the bill, find it has been sent back to the indorser protested for non-acceptance ; they are not liable to the holder, if, on having received fresh orders from the customer not to pay the bill, they refused to do so, when it is presented subsequently by the holder (*k*).

(*g*) *Fuller v. Smith*, 1 Car. & P. 197.

(*h*) *Raper v. Birkbeck*, 15 East, 17.

(*i*) *Cox v. Troy*, 5 B. & A. 474.

(*k*) *Stewart v. Fry*, 1 Moore, 74 ; 7 Taunt. 339.

Specific Appropriations to take up Bills.—Money paid in, by a customer, expressly for the purpose of meeting a bill, accepted by him, and lying at the bank for payment, is money paid and received to the use of the holder of the bill, and cannot be applied to the general account of the customer (*l*). At least this is so as between the customer and the banker; but when there was an express agreement between his bankers and a customer that a sum which he paid into the bank should be applied to take up a bill which he had accepted, payable at their London correspondents, and not to his general account, and then the customer became insolvent, and the bankers applied the sum to his general account, and it did not appear that they had advised their London correspondents to pay the bill; the holder could not maintain an action against the bankers for money had and received to his use, for want of privity (*m*).

Refusal to pay.—Even if a banker, at whose house a bill is accepted payable, by mistake, (not under circumstances showing want of due care,) cancel the acceptance and refuse to pay the bill, he does not necessarily render himself liable to the holder, in an action on the case, or otherwise; for instance, he will not be liable, if he has no effects of the acceptor's to meet the bill (*n*).

Refusal to take.—The holder of a bill may refuse, as has already been stated, to take a special or qualified acceptance; on the other hand, an acceptor may refuse to pay a bill, which, after a general acceptance by him, has been, without his consent, altered so as to appear to be payable at a banker's. The ground is, that the contract is, by the alteration, made a different one, from that into which he

(*l*) *De Bernales v. Fuller*, 14 East, 590, n.

(*m*) *Moore v. Bushell*, 27 L. J., Exch. 3.

(*n*) *Novelli v. Rossi*, 2 B. & Ad. 757; *Warwick v. Rogers*, 5 M. & G. 340, 352.

entered (o). But it does not appear that such an alteration of the bill, as an acceptance, by mistake, *ex. gra.*, as in the last paragraph, operates to affect, in any way, the liabilities of the other parties to the bill, both because such is not, it is believed, the usage of merchants, and because such alteration does not, in fact, vary the contract into which the other parties entered, with respect to the bill; for the liability, which they originally undertook, was to pay the bill, in case the drawee did not, and the refusal to accept merely ascertains and announces, that he will not make himself liable to pay. It is, therefore, submitted, that such alteration is not a material alteration, such as to destroy the validity of the instrument *in toto*, within the meaning of the principle, as applied to deeds and contracts (p).

Promissory Notes.—Promissory notes, it must be observed, are not within the above-mentioned statute 1 & 2 Geo. IV. c. 78; the consequence is, to make it necessary, in suing on a promissory note made payable in the body of it at a bank, to aver in the declaration, and to prove at the trial, presentment at the bank (q), if the allegation of presentment is denied in pleading; and, in this respect, there is no distinction between notes which are negotiable and those which are not so (r).

Where, however, the place of payment is not mentioned *in the body of the note*, but merely in a memorandum, then it is no part of the contract that the note should be payable at the bank, &c., and it is not necessary to allege it to be so (s), and so presentment there is not necessary (t).

(o) *Burchfield v. Moore*, 23 L. J., Q. B. 261; 3 El. & Bl. 683.

(p) *Parry v. Nicholson*, 13 M. & W. 780.

(q) *Emblin v. Dartnell*, 12 M. & W. 830; *Vanderdonckt v. Thellusson*, 19 L. J., C. P. 13; 8 C. B. 812; *Sands v. Clark*, 8 C. B. 751.

(r) *Spindler v. Grellett*, 1 Exch. 384.

(s) *Saunderson v. Judge*, 2 H. Bl. 510; *Masters v. Baretto*, 19 L. J., C. P. 50; *per Lord Campbell*, C. J., *Warrington v. Early*, 23 L. J., Q. B. 48.

(t) *Williams v. Waring*, 10 B. & C. 2.

CHAPTER V.

ORDERS ON BANKERS.

ONE of the duties of bankers towards their customers is, in general, to obey the orders, written or oral, of their customers, with respect to the accounts of the customers with them. Some decisions have been made, on written orders, which may usefully be stated.

A customer writes to his bankers thus:—

Waterford, July, 1822.

I request you to hold over 400*l.* from my private account to the disposal of J. Mintern & Co.

MESSRS. MINET & STRIDE.

WM. GIBSON.

The customer delivered this order to a partner in the house of J. Mintern & Co. on the 8th July, when there was, in the bankers' hands, a balance of 400*l.* in his favour; the order was not delivered to the bankers until about the 13th July; on receiving it, one of the bankers wrote, on the debit side of the customer's account, "N.B. By Mr. Gibson's (the customer's) letter of the 8th July, 1822, 400*l.* is to be held at the disposal of Messrs. J. Mintern & Co." On the 19th March, 1823, the customer countermanded the order; the bankers communicated this to J. Mintern & Co., and asked their direction. Mintern & Co., who also banked with the same bankers, wrote to them, to place the 400*l.* to the credit of their account. The bankers did so, and then informed the customer, that they had transferred the money to Minterns. Nevertheless, it was held, that they were wrong in doing so; for that the countermand was good, inasmuch as, at the time it was given, no payment, and no appropriation, had been made; the jury finding that the order was executory, and had not been acted upon (*a*).

(*a*) *Gibson v. Minet*, 1 Car. & P. 247; R. & M. 68; 9 Moore, 31; 2 Bing. 7; the memorandum on the account did not amount to an assent.

Nearly the same thing, in effect, had already been decided in a case where a person received a letter from his debtor, stating that he had remitted bills to his bankers, out of which his debt was to be paid. The bankers refused to indorse the bills away, or otherwise to act on the instructions they had received, and it was considered, that the property in the bills, and their produce, still continued in the remitter (*b*). The bankers got the proceeds of the bills when due, but, from the first, had refused to hold them on the specified terms; and the money, so held, was considered to have been money had and received to the use of the remitter generally. They never became the agents of the creditor; had they once assented to hold the money, to the use of the creditor, they could not have retracted (*b*), for then there would have been an appropriation irrevocable, except by the consent of all parties (*c*).

It will be observed, that the bankers never became debtors to the remitter on the proposed terms. On the other hand, if the bankers had paid the money to the third party, such payment would have been good, at least, if they had acquiesced in the order; and they would have been discharged as against their customer (*d*).

Where an order was made on a banker to pay over a sum of money to a third person, to whom the order is not communicated; but the banker does not pay over; and then the order is countermanded, the third person cannot insist on the banker paying him the sum (*e*).

Under certain circumstances, such an order (*f*) on bankers might assume the character of a bill, and require a stamp (*g*), and it would appear that it might be obligatory, though the word pay were not used, if equivalent words, such as "credit in cash," were used (*h*).

(*b*) *Williams v. Everett*, 14 East, 582.

(*c*) *Walker v. Rostron*, 9 M. & W. 411.

(*d*) *Wharton v. Walker*, 4 B. & C. 163.

(*e*) *Morrell v. Wooten*, 16 Beav. 197.

(*f*) *Diplock v. Hammond*, 23 L. J., Chanc. 550.

(*g*) *Russell v. Powell*, 14 M. & W. 418.

(*h*) *Ellison v. Collingridge*, 19 L. J., C. P. 268; 9 C. B. 570.

Such an order needs not be in writing, as has been before stated; and therefore, if a man held a bill of exchange, of which another was the acceptor, and both were to go together to the banker, who had money of the acceptor's deposited with him, and it was agreed, amongst them, that the banker should hold that money until the bill of exchange should be satisfied, and, if not satisfied, that he should pay the bill out of that money, that would constitute a good consideration, and the arrangement could not be altered afterwards, except by the consent of all parties (*i*). The assent of the banker to the order is a recognition that the customer's account with him is in such a state as to show that he is debtor to the customer, and therefore bound, according to the usage of bankers and to the law, to conform to such orders as he may receive from the customer respecting the disposition of the debt; but if the account is not in that state, but he is in advance to the customer, the latter has no right to call upon the banker to make a further advance, and the banker has, in such case, the option whether he will assent to the order, if given, and he will be perfectly justified in repudiating it (*k*).

Also it is quite clear, that such an order, when made in writing, does not require a stamp, either as a bill of exchange or as an agreement, provided the order embodies nothing more than a mere direction to hold or pay over money to the party named (*l*), and provided the order be not, previously to its coming to their hands, delivered to the payee (*m*).

Order to receive Dividends.—By 27 & 28 Vict. c. 90, s. 1, no letter or power of attorney for the sale, transfer or acceptance of government or parliamentary stocks or funds,

(*i*) *Walker v. Rostron*, 9 M. & W. 421.

(*k*) See instance *Williams v. Everett*, 14 East, 592.

(*l*) *Walker v. Rostron*, 9 M. & W. 413; *Parker v. Dubois*, 1 M. & W. 30.

(*m*) *Parsons v. Middleton*, 6 Hare, 261.

and duly stamped, shall be chargeable with any other duty by reason of its containing therein an authority for the receipt of dividends. And by sect. 2, no letter or other writing under hand only containing any request or direction to any joint stock or other company or society, or to any secretary, treasurer or other officer thereof, or to any banker, by the owner or proprietor of any stocks, funds or shares of or in any such company or society, to pay the dividends or interest arising from any such stocks, funds or shares to any person named in such order, request or direction, shall be chargeable with stamp duty as a letter or power of attorney.

Order to distribute or pay Money.—An order by a person depositing money at his bankers, that it shall be distributed, in named amounts, between certain persons, does not make the bankers liable to those persons, or any of them; they are only responsible, for the sum deposited, to the depositor; although they are aware of the destination of the money (*n*). Such an order remains revocable, by the party giving it, until the occurrence of one of two events,—the payment over, by the bankers, to the persons for whom the sum was deposited; or the making of some binding engagement by the bankers with them, which gives the latter a right of action against the former (*o*). For instance, had the bankers stated, to those persons, that they held the money for them, having assented to the order of their customer, that would have rendered them liable to the persons for whom they held the money (*p*), for their assent could not be retracted (*p*).

So where my debtor places money in the hands of his banker to be paid over to me, on the happening of a cer-

(*n*) *Pinto v. Santos*, 5 Taunt. 447.

(*o*) *Gibson v. Minet*, 2 Bing. 7; *Williams v. Everett*, 14 East, 592; *Scott v. Porcher*, 3 Mer. 652; *Lilly v. Hays*, 5 A. & E. 548; *Brind v. Hampshire*, 1 M. & W. 372; *Malcolm v. Scott*, 5 Exch. 601; *Sewell v. Raby*, 6 M. & W. 25; *Hutchinson v. Heyworth*, 9 A. & E. 375.

(*p*) *Fruhling v. Schroeder*, 2 Bing. N. C. 77; *Walker v. Rostron*, 9 M. & W. 411, 421.

tain event, and the banker assents, I cannot sue the banker until the happening of the event, and only then (as it seems) if he has, besides assenting, conveyed to me notice of his assent (*q*).

Banker as Stakeholder.—But when money is placed in the hands of a banker, as a stakeholder, then, like any other stakeholder, his authority, on the one hand, is irrevocable (*r*), and neither party can recover the money until the event has occurred (*s*), provided the object of depositing the stake be a lawful one (*s*); and, on the other hand, the party who, by the issue of the event, is declared to be entitled to the stake, may thereon sue the banker for it. Thus, when A. obtained, from the Crown, the use of a piece of land, at a rent, to erect galleries on, to view a coronation, and underlet part of it to B., on the same terms, and his proportion of the rent was paid by B. to A., but was afterwards deposited in the hands of A.'s bankers, on condition, that if no coronation took place, and A. was remitted the rent by the Crown accordingly, B. was to have returned to him the sum so deposited. The coronation took place, but, in consequence of the speculation proving unprofitable, the rent was remitted to A., who refused to return the money paid him by B. The Court held, that B. was entitled to recover from the bankers the sum deposited (*t*).

Order to obtain Acceptance.—If a person delivers a bill of exchange to his bankers to get accepted for him (he being payee), and acceptance is refused, but they omit to communicate the circumstance to the depositor, he has a right of action against them, and may recover da-

(*q*) See the cases in the last two notes.

(*r*) See 2 M. & W. 372, 373.

(*s*) *Emery v. Richards*, 14 M. & W. 728; *Brown v. Overbury*, 11 Exch. 715; *Martin v. Hewson*, 10 Exch. 737.

(*t*) *Truscott v. Marsh*, 2 D. & R. 712.

mages in proportion to the injury he can show he has sustained (*u*).

Order to accept Drafts against Bills of Lading.—A banker, receiving instructions from his customer to accept bills of exchange which a correspondent of his would draw against bills of lading, is not bound to ascertain the genuineness of the bills of lading before accepting or paying the bills of exchange; and if the banker pays the bills, although the bills of lading should afterwards turn out to be forgeries, he will be entitled to recover from his customer what he may have paid in respect of the bills of exchange (*x*). The facts of the following case fully illustrate this position:—

Thiedemann, a merchant at Newcastle, was a customer of Messrs. Woods, bankers at Newcastle, whose London agent was the Union Bank of London. Otto Homeyer, a merchant at Wolgast, in Prussia, wrote to Thiedemann, stating that, in consequence of a conversation he had with his traveller, he was inclined to consign to him a cargo of wheat, and asking for how much, and at what date, he, Thiedemann, would open for him a credit in London. Thiedemann replied, “You may draw against transmittal of bill of lading, 30s. to 32s. per quarter in advance for your best yellow wheat, on our account, at fourteen days, one, two or three months’ date, on the Union Bank of London. Insurances we can effect for you at Lloyd’s at half per cent. premium *in toto*.” Homeyer afterwards wrote to Thiedemann, stating that he was about to consign to him 8,320 scheffels of wheat, shipped by the vessel “Anna,” Captain Kell, and that he annexed a duplicate bill of lading, and at the same time, Homeyer wrote to the Union Bank of London, informing them that he had drawn on their bank six bills of exchange for 400*l.* each, for account of Thiedemann. The Union Bank having no instructions,

(*u*) *Van Wart v. Woolley*, 3 B. & C. 439.

(*x*) *Woods v. Thiedemann*, 1 H. & C. 478.

but knowing that Thiedemann was a customer of Messrs. Woods, sent the letter to them. Afterwards, Messrs. Bischoffsheim and Goldschmidt, as holders for value, presented to the Union Bank for acceptance six bills of exchange for 400*l.* each, drawn and indorsed by Homeyer, together with a paper writing purporting to be a bill of lading, indorsed by him in blank. Messrs. Woods having sent to Thiedemann the letter which Homeyer had addressed to the Union Bank, Thiedemann came to their bank, and had some conversation with their manager respecting the cargo of wheat supposed to have been shipped by Homeyer, when Thiedemann said "it was a large amount, and that they must only accept against the bill of lading." Thiedemann then handed to Messrs. Woods a letter, signed by him, as follows:—"We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Otto Homeyer, of Wolgast, for 2,400*l.*, against properly indorsed bill of lading of 8,320 scheffels of wheat, per "Anna," Captain F. Kell, master, on our account." The Union Bank, at the request of their correspondents, Messrs. Woods, accepted the drafts, and Messrs. Woods debited Thiedemann with the amount. Before the drafts became due, it was discovered that the bill of lading was a forgery, and that no cargo had been shipped on board the "Anna." Homeyer afterwards came to this country, and was convicted of uttering the forged bill of lading. The Union Bank having paid the bills and debited Messrs. Woods with the amount, it was held, that Messrs. Woods were entitled to recover the amount from Thiedemann, as money paid to his use and on his account. Had Thiedemann intended to have secured himself against Homeyer's fraud and forgery, it was said, he should not have given his bankers the order to pay the bills till he had satisfied himself that the wheat had been shipped, and a genuine bill of lading had been properly issued; but in the absence of any specific directions from their customer, and in ignorance of the fraud practised upon

Thiedemann by Homeyer, the bankers were under no legal obligation to inquire into the genuineness of the bill of lading accompanying the bills of exchange.

Order to transfer to credit of another.—We next investigate the effect of an order given by a customer to his bankers, directing them to transfer a sum of money from his account to the credit of another person, who also banks with them.

A., is debtor to B. A. desires his bankers, who were indebted to him largely, to place to the credit of B., who was indebted to them, a sum of money (for goods sold), so as to make the same as a bill of exchange at one month, which the bankers consented to do, but only considered it as a payment to be made at a future day. Such a transaction does not amount to a payment; and where the bankers become bankrupt before the day on which the credit would expire, it is held that A. is not discharged by such inchoate payment (*y*).

Order to place to credit of another.—So, where A. pays in money, to be placed to the credit of B., upon a condition; the money in the meantime to stand, in the bankers' books, in the name of A., it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though B. has written to desire it to be paid in generally (*z*).

In a case where A., in October, desires B. to pay his rent, then due to A., into A.'s bankers, and, by mistake, the money is not then paid, but B., having also an account at the same bank, orders the amount to be transferred to the credit of A., which was done on Thursday, the 8th December. B. next day writes to A. mentioning this. A., living at a distance, does not receive information till Sunday, the 11th December; the bankers having failed

(*y*) *Pedder v. Watts*, 2 Chit. 619.

(*z*) *Calley v. Short*, Cooper Ch. R. 148.

Saturday, the 10th December. This was held to be a sufficient payment by B., although, at the time of the transfer, B.'s account was overdrawn by 900*l.*, and he had no general directions to pay his rent into the bank (a).

Order to hold at disposal of another.—Where a customer orders his banker to hold money of his, at the disposal of A., to whom the customer writes word of what he has done, and the banker advises A. accordingly of the receipt of the order, and of his having registered it, but declines to accept bills for any part of the amount, stating that he is in advance to the customer, adding, however, that should remittances come forward to enable him to meet the wishes of the customer, he would lose no time in advising A. This was held to fall short of an absolute contract with A., and, therefore, it would be held that A., neither at law (b) nor in equity (c), had any remedy against the banker.

Order to invest.—Although there is nothing of a fiduciary character in the ordinary relations between banker and customer, who are, under such circumstances, simply debtor and creditor; the latter having the right to call for his money, or any part of it, immediately; yet if the dealings between them go beyond this point, in any way, and the banker is employed by the customer to make investments for him, or otherwise to manage his monetary transactions, then the banker is, in that respect, the agent of the customer, and is bound to observe complete good faith in the performance of the customer's orders.

A partner in a banking-house undertook to invest money on good security for a customer of the firm, and the customer was induced, from the belief that she was dealing with him, as a partner, to advance the money, and his re-

(a) *Eyles v. Ellis*, 4 Bing. 112; 12 Moore, 306.

(b) *Malcolm v. Scott*, 5 Exch. 601.

(c) *S. C.*, 2 Mac. & G. 601.

presentations proving to be fraudulent: it was held, that, in the absence of evidence of notice to the other partners, they could not be made liable for such a transaction, as not being within the ordinary business of bankers (*d*).

It has been admitted to be difficult to support the following case, except upon the sole ground of the fraud:—A. gives orders to her bankers to invest a certain sum in their hands for her in the Navy Annuities, which they state to her that they have done, contrary to the truth; afterwards A., as surety, joins B. in a promissory note given to them; the bankers become bankrupt: and Lord Eldon held, on the ground of the fraud, that the money due in respect of the sum ordered to be invested should be set off against the debt for which A. had become surety, and that the assignees should be restrained from suing either A. or B. in respect of the note (*e*). Such false representation by bankers has been said to be indictable as a conspiracy (*f*).

So with respect to securities deposited with them, as exchequer bills, certificates of shares, coupons, bonds, debentures, either for safe custody, or with the intention that they shall receive the interest or dividends (*g*); and it is their duty scrupulously to perform the orders of their customers, touching the disposition of these deposits.

Persons depositing securities with bankers ought to reflect that, in most cases, they have not and cannot have any other guarantie for the safety of their deeds, &c. than the integrity of the partners individually. The following case exemplifies this:—A customer of a banking firm, whose practice it was to receive deposits, at their banking house, of boxes of securities belonging to their customers for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months, or sooner if required, and he afterwards

(*d*) *Bishop v. Countess of Jersey*, 2 Drew. 143; 23 L. J., Chan. 483.

(*e*) *Ex parte Stephens*, 11 Ves. 24.

(*f*) *Auriol v. Smith*, 18 Ves. 203; see now 24 & 25 Vict. c. 96, s. 75.

(*g*) See instance *Glyn v. Baker*, 13 East, 509.

lent other part of such securities to A., one of the partners in the firm, on his own separate account, other securities being, on both occasions, deposited by the respective borrowers, according to agreements, in pledge for those which were borrowed. After the expiration of three months from the time of the first loan, the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited, in the books of the firm, with interest on all the securities borrowed, but that A. had, without the knowledge either of his copartners or the customer, abstracted the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use.

Held, that the firm was not responsible for the abstraction by A. of the securities pledged upon the second loan, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as it did not appear that the firm had any authority to open the box or to examine its contents; and, consequently, that the customer had no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of A. (h).

The following case (which illustrates the principle that a partnership creditor has a right to receive payment of his debt, out of the assets of a deceased partner, to the full amount of his demand against the original firm, and *that* although the demand may arise from a fraud to which the deceased was no party (i),) may also be usefully cited here, to exemplify the duties which bankers owe to their clients, and the retribution which falls on the violation of them, reaching often to those who are in no way guilty of the crime or fraud in question.

(h) *Ex parte Eyre*, 1 Ph. 227.

(i) *Oldaker v. Lavender*, 5 Sim. 239.

Certain stock was transferred to a partner in a banking house, by way of security, for money borrowed of the firm by a customer. The debt was subsequently discharged, but, by consent, the stock was not retransferred. The stock was afterwards fraudulently disposed of. Then one of the partners died, and, after his decease, the remaining partners became bankrupt. Lord Eldon held the creditor entitled to have the remaining stock transferred to him, to receive the residue of his debt, if possible, out of the estate of the bankrupt partners, and to go against the deceased partner's estate for the deficiency (*k*). As was observed by Lord Eldon, and as the principle appears to be indisputably established, "the deceased partner's estate must remain liable, in equity, until the debts which affected him at the time of his death have been fully discharged" (*k*).

In such cases of misapplication of stock, the creditor may elect either to consider the proceeds of the stock as a debt due from the deceased partner's estate, or to have the stock specifically replaced (*l*).

As to Trust Funds.—When a trustee, under a will, permits a trust fund, as the monies are from time to time realized, to be paid into the hands of bankers who have knowledge of the trust, and one of the firm, without the assent of the trustee, deals with a portion of the fund by investing it on mortgage; there, though the bankers were held not to be jointly and severally liable in the character of trustees, but only under a liability as between banker and customer, yet, on the bankruptcy of the bankers, the trustee could only prove, against their joint estate, for such balance as was in their hands at the time of the bankruptcy (*m*). A fund stands to the account of two trustees, and the bankers have notice that it is a trust fund: then, by the direction of the tenant for life alone,

(*k*) *Vulliamy v. Noble*, 3 Mer. 593.

(*l*) *Baring's case*, 1 Mer. 611.

(*m*) *Ex parte Burton*, 3 M. D. & De G. 364.

they transferred it to his account with them, and thereby obtained payment of a debt due from him to them: the trustees may proceed in equity against the bankers to have the trust fund replaced, and that six years had elapsed since the transfer makes no difference, nor does it signify that the bankers had not notice of what were the precise trusts, but only knew generally that the funds were trust money (*n*).

Bankers also are treated in some degree as having a fiduciary character, as regards the payment of cheques, so as to be liable if they honour a cheque, which, they have the means of knowing, is drawn in fraud of the depositor of the fund out of which they pay it. Thus, where the receiver of an estate has a private account, and then opens another account, in the name of the estate, under circumstances to affect the bank with knowledge that the sums placed to that account belong to the owner of the estate, and then draws a cheque on the estate account and pays it into his private account, the bank is liable for the amount to the owner of the estate (*o*).

On the other hand, if a customer pays in a cheque to his account, the bankers cannot refuse to give him credit for it, merely because it has been improperly received (*p*).

Illegal Orders of Customer — Bankers are not unfrequently liable to be made responsible for the objects of those who lodge money with them, to be retained and paid over on a given event. Thus, a banker, who permits a sum of money to be paid into his bank, for the purpose of being paid over, for corruptly procuring an appointment under Government, may be indicted, for a conspiracy, along with those who are to procure the appointment and to receive the money (*q*).

(*n*) *Bridgman v. Gill*, 24 Beav. 302; following *Pennell v. Deffell*, 4 De G., Mac. & G. 372; *Pannell v. Harley*, 2 Collyer, 241, and *Barnewell, Ex parte*, 6 De G., Mac. & G. 801.

(*o*) *Bodenham v. Hoskyns*, 2 De G. Mac. & G. 903.

(*p*) *Tassell v. Cooper*, 9 C. B. 509, 526.

(*q*) *Rex v. Pollman*, 2 Camp. 233.

The same principle would seem to apply to money deposited with a banker as a stakeholder, as it were, to be paid over, after an election, for the purposes of bribery.

So, wherever bankers receive money, and agree to hold it to be paid over for any purpose forbidden by the law, it seems they would be alike liable, for, in such case, an individual stakeholder would be liable, if fixed with a knowledge of the illegal purpose, and bankers are in no different situation than other individuals; they are not, like carriers, innkeepers, &c., obliged to serve all customers, and therefore in some respects protected by the law; it is at their option whether they will open an account, or allow money destined for an illegal object to be paid in on an open account.

CHAPTER VI.

ACCOUNTABLE OR DEPOSIT RECEIPTS.

THE subject of accountable receipts, given by bankers, is one of some importance, but one of which the development, by means of judicial decision, does not appear to be in proportion to what one might desire; in other words, but few questions on, or relating to, the subject have been presented to the Courts for decision.

Where a person deposits money with a banker, without intending that it should be called for, from time to time, by cheques, it is a frequent practice for bankers to contract to pay interest on the monies thus lent to them, and to give an accountable receipt,—that is, a memorandum of the receipt of the principal, an acknowledgment that they are accountable for it on demand, and a promise to pay interest upon it during the time it remains in their hands (*a*); but the latter clause is not always, or necessarily, a part of the instrument.

The reader will remember that bankers are not liable to pay interest on money deposited with them, in the absence of an agreement to do so (*b*).

An acknowledgment in this form—

“ Mr. T. has left in my hands 200*l*.

“ J. A.”

does not require a stamp to make it evidence (*c*); and generally, it is enacted, that “ receipts given for money deposited in any bank, or in the hands of any banker, to be accounted for, whether with interest or not,” are exempt

(*a*) *Way v. Bassett*, 5 Hare, 56. Sometimes it is stated expressly not to bear interest, as in *Stapleton v. Stapleton*, 14 Sim. 186, 187.

(*b*) *Edwards v. Vere*, 5 B. & Ad. 282.

(*c*) *Tomkins v. Ashby*, 6 B. & C. 541; *Cory v. Davis*, 14 C. B., N. S. 370.

from stamp duty, “ provided the same be not expressed to be received of, or by the hands of, any other than the person to whom the same is to be accounted for” (*d*). But receipts or acknowledgments given by bankers for sums paid to, or deposited, with them, for or upon letters of allotment of shares, or in respect of calls upon scrip or shares of or in any company, are not exempt. If the sums so paid amount to 2*l.* or upwards, the bankers must give a penny stamped receipt upon each payment.

A., to whom the Sheffield and Rotherham Bank was indebted, takes accountable receipts for the sums due from the bank.

The course of dealing was, that as long as the sums, for which these receipts were given, remained in the bankers’ hands, the receipts were returned to the bank once a year to be cancelled, when the interest, for the past year, was either paid or allowed in account, and fresh receipts, in place of the cancelled ones, were given.

A., died, and, pending a contest for the administration of his estate, the above-mentioned accountable receipts came into the hands of a stranger, who, by a fraud, obtained payment of the sums due upon them; the receipts were returned; and they were afterwards cancelled by tearing off the signature at the foot.

The administrator of A. was held, there being nothing to show that the receipts were transferable so as to entitle the holder to demand payment of the sums represented by them, to be in a position to maintain a suit in equity against the bank for payment of those sums (*e*).

Here, it is to be observed, the mode in which payment was obtained was this:—The receipts were presented at the Worksop Branch of the Nottinghamshire Bank, with an indorsement purporting to be that of A., and it being

(*d*) 16 & 17 Vict. c. 59 (Schedule). Before this act an acknowledgment by a banker of the receipt of money, paid as a deposit, by an allottee of shares in a public company, did not require a stamp. *Clarke v. Chaplin*, 1 Exch. 26.

(*e*) *Pearce v. Creswick*, 2 Hare, 286.

unknown to the manager of that branch that A. was dead, the money was paid and the receipts given up; their amount was, in the course of business, charged by the Nottinghamshire Bank to their London bankers, to whom the receipts were remitted; shortly afterwards, the Sheffield and Rotherham Bank directs the same London bankers to give credit to the Nottinghamshire Bank for the amount, and the receipts were delivered up to the Sheffield and Rotherham Bank, who were, therefore, wholly innocent(*f*).

On change of Firm.—A person depositing money at bankers, and taking their accountable receipt, does not, by continuing to leave his money in the bank, after a dissolution of the original firm, and the constitution of a new one, consisting of some of the old members and of other persons, discharge the former partners who had gone out, although he receives interest regularly from the new firm, and gives no notice, and continues to transact business with them in the common course, and *that* for a period of four years, until they became insolvent. Such facts are not sufficient to enable a jury to come to the conclusion that he did discharge the outgoing members of the firm(*g*), and assent to transfer the credit to the new firm, though he had made fresh deposits with them and received fresh accountable receipts from them(*g*). Of course, the outgoing partners are not liable to the customer beyond the amount due to him at the time of their retirement; on the other hand, the incoming partners are not liable for debts incurred previously to their joining the firm: so that a customer, suing for the balance of his account, is liable to be non-suited, upon its being shown that one or more of the de-

(*f*) *Pearce v. Creswick*, 2 Hare, 286.

(*g*) *Gough v. Davies*, 4 Price, 200; *Daniel v. Cross*, 3 Ves. 277. See as to evidence, to show knowledge of retirement from banking firm and intention to credit new firm, *Hart v. Alexander*, 2 M. & W. 484. It might, in some cases, be found in practice more desirable for the customer to transfer the credit to the new firm, as regards the question of enforcing the responsibility. *Lyth v. Ault*, 7 Exch. 669; 21 L. J., Exch. 217.

fendants was not in the firm at the time when the cause of action accrued (*h*).

On Bankruptcy of Firm.—A., deposits monies with B., C. and D., who are partners in banking, carrying on business under that firm, and receives from them promissory notes, in which they promise to pay him the amounts, three months after sight respectively, with interest. In September, 1831, A. dies. In March, 1837, B. dies, having appointed C. and X. his executors. C. and D. continue the banking business, in the same firm as before, till 1842, and interest is regularly paid, on the promissory notes, by the firm until that time. In May, 1842, the customers of the bank are invited to transfer their accounts to the Isle of Wight Joint-Stock Banking Company. In December, 1843, C. and D. become bankrupt. In the same month, the executors of A. file a bill in equity, against the executors of B. and the devisees under his will, for payment of the amounts of the promissory notes, out of the personalty or real estate of B. The acts of the surviving partners of B. were held not to have the effect of taking the debt, upon the notes, out of the operation of the Statute of Limitations, as against the real or personal estate of the deceased partner; for that acts done by one of the surviving partners, who was executor of the deceased partner,—which acts the surviving partners, as such, were bound to do,—could not *primâ facie* be considered to have been done in the character of executor. The notes were dated respectively—21st January, 1826; 22nd January, 1831; 28th February, 1835; the last being received, by the executors of A., for monies deposited by them on that date (*i*). This case is obviously well deserving of notice, as regards the effect of the Statute of Limitations.

(*h*) *Craufurd v. Cocks*, 6 Exch. 290.

(*i*) *Way v. Bassett*, 5 Hare, 55.

By or on behalf of Infants.—Bankers cannot at law, it seems, bind themselves, by an accountable receipt, for money deposited with them, given to or on behalf of an infant (*k*). But, in equity, bankers may enter into an accountable receipt, or a promissory note having the same effect as an accountable receipt, with a trustee for an infant. Thus, where bankers made a promissory note in the following form :—

Fourteen days after sight, I promise to pay to Mrs. H. O., trustee for J. R. W., or order, 2,000*l.* with interest at two and a half per cent.

For O. B. M. and HANBURY.

(Signed) DANIEL HANBURY.

and the account was kept in the name of Mrs. H. O., as trustee for the above-named person, an infant, these acts were held to be sufficient to constitute her a trustee for the infant; and the bankers were held to have done rightly, at her death, in paying over the money to her executor, since, as representing Mrs. H. O., the trust devolved upon him (*l*).

Where, however, money was transferred in the books of bankers, by order of a customer, to the account of certain persons, of whom the customer was one, but there was nothing to show that the others had ever had notice, and there was some evidence that the transfer had been ordered with the fraudulent intent of evading legacy duty (*m*), and that he had shown an intention to exercise acts of ownership over the fund: there, although the interest allowed by the bankers had been duly carried to the credit of the account, it was held, that this was a declaration of trust which was imperfect; that it might have been revoked, in which case the trustees could not have recovered from the bankers, on the one hand, and the bankers, on the other, could not have refused to pay to the customer (*n*).

(*k*) *Calland v. Lloyd*, 6 M. & W. 26.

(*l*) *Wheatley v. Purr*, 1 Keen, 551.

(*m*) See *Holliday v. Atkinson*, 5 B. & C. 531.

(*n*) *Gaskell v. Gaskell*, 2 Y. & J. 510.

But where one of the partners in a banking firm opened an account with the firm, in his wife's name, for the education of certain infant children, and caused an accountable receipt to be signed, by the other partner, on behalf of the firm, purporting to be for 800*l.*, received from the wife for the education of the children, and caused that sum to be placed to the credit of the account so opened in the wife's name, and his private account to be debited with the same, the transaction was considered to embody a complete and an irrevocable declaration of trust in favour of the children (*o*).

“*One's Account with one's Banker,*” is a mode of speaking very commonly used; and on that ground it seems desirable to ascertain, if possible, the legal effect of the term. Now, the correct application of the phrase is made, only when it is used of an immediate account, on which a person can draw: and it is not justly applicable in a case where a person, having an immediate account with a provincial bank, which has for correspondents and agents a banking house in London, speaks of having an account with the latter house; and, if he orders his debtors to pay in monies to the latter house, and the former stops payment, the accounts between the houses being unsettled, he cannot recover the monies from the latter. Also, the debtors having paid in the monies, in obedience to a letter from the creditor, ordering them to pay in “for our account,” and having no directions of a more specific nature, will be held to be discharged (*p*).

Deposit Receipts.—Deposit receipts may be given in such a way as to cause a double liability, which took place under the following circumstances:—

John O'Brien, father of Daniel O'Brien and Catherine

(*o*) *Stapleton v. Stapleton*, 14 Sim. 186.

(*p*) *Breed v. Green*, Holt, N. P. 205.

Callaghan, lodged a sum of 150*l.* in a bank, upon a deposit receipt, in his own name. Upon Daniel's producing the receipt sometime afterwards, and demanding the interest, he was refused, the bank paying only to the depositor in person; John, upon this, used, for some time, to come, along with Daniel, and receive the interest, taking the fresh receipt in his (John's) name, on each occasion. Afterwards he obtained permission, that Daniel should receive payments upon producing the receipt, indorsed by John. Then Daniel, by his directions, pays an additional sum of 5*l.* into the bank, and obtains a new deposit receipt for the whole amount then in the hands of the bank, being 155*l.*, but in the name of Catherine O'Brien, (afterwards Callaghan,) Daniel telling the manager that his father intended 155*l.* to be the portion of his daughter Catherine, but desired to retain a control over it during his life, and that he wished the deposit receipt should be drawn in her name. In a few days afterwards, John O'Brien died, Daniel took out administration, *testamento annexo*, and, as administrator, claimed the 155*l.* Shortly after, Catherine married, and she and her husband demanded payment of this money. Both Daniel and Catherine, with her husband, commenced actions against the bankers, who filed a bill of interpleader against both; but the bill was dismissed, this not being the case of a double demand for one duty, but a case in which there may be two liabilities; and a mere pretext of conflicting claims will not support a bill of interpleader; the Court is bound to see that there is a question to be tried. Here the transaction created a debt from the bank to Catherine, in consequence of the mode of dealing adopted by the bankers; they were not at liberty to resist her demand, or to treat the case as one of interpleader, because John's representative, who made the last deposit, and took the new receipt, chose to rescind the whole transaction. It is quite consistent with this view, that John's representative may still be able to recover against the bankers; but it is their own fault, if they created

a new liability in themselves, without obtaining a sufficient discharge from the original title to the money in their hands (*q*).

The bank, in the above case, applied for the bill of interpleader ; but it was pointed out, by the Court, that in so doing they asked it to destroy their own mode of dealing ; for, if the cancellation of the old receipt, and the issuing of the new receipt, did not create a liability to the person named in the new receipt, the bankers' system of deposit receipts was defective.

A deposit note for money, like a deposit for goods, passes by delivery of the instrument, and requires no assignment (*r*).

Forging.—Altering the sum, for which an accountable receipt is given, is altering in a material part, and indictable as forgery (*s*).

By 24 & 25 Vict. c. 98, s. 23, it is felony to forge an accountable receipt, whether for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on, or assignment of, any such accountable receipt ; and so is the altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any such accountable receipt, with intent to defraud. The punishment for these offences is either penal servitude for life, or for a term of three years, or imprisonment for a period not exceeding two years, with or without hard labour, and with or without solitary confinement.

Where it was the practice of a bank to treat a receipt, with the depositor's name thereon, as an order for the payment of the money deposited, and interest, upon the receipt being presented to them ; and a prisoner took the receipt to the bank, and, having written the depositor's

(*q*) *Cochrane v. O'Brien*, 2 J. & L. 388.

(*r*) *Woodhams v. Anglo-Australian and Universal Life Assurance Company*, 3 Giff. 238 ; 8 Jur., N. S. 148 ; 5 L. T., N. S. 629.

(*s*) *Reg. v. Johnston*, 5 Cox, C. C. 133.

name thereon, delivered it to the bankers, who paid him the principal and interest due thereon: it was held, that he was properly convicted, as for a forgery of an order for the payment of money (*t*).

A person producing a forged receipt, purporting to be a receipt for poor rates due from A., for the purpose of inducing the prosecutor to send money to A. as a responsible person, is within the above statute, for it is not necessary that money should be obtained directly upon it, or by the utterer at all (*u*).

Obtaining by false Pretences.—By 24 & 25 Vict. c. 96, s. 89, it is indictable to procure, by any false pretence, an accountable receipt to be delivered to another person for the use or benefit of the person making the false pretence (*x*).

(*t*) *Reg. v. Atkinson*, Car. & M. 325.

(*u*) *Reg. v. Ion*, 2 Den. C. C. 475; 21 L. J., M. C. 166.

(*x*) See *Reg. v. Garrett*, 23 L. J., M. C. 20.

CHAPTER VII.

RELATION OF BANKER AND CORRESPONDENT.

VARIOUS occasions occur for observing the frequency, in questions of banking law, with which the principle is applicable by which the incidence of a loss is determinable, when the question is, which of two parties, who are both equally innocent of fraud, or crime, in the transaction, must bear a loss. This principle is particularly deserving of attention in questions arising on dealings of a customer with his bankers, who are obliged, in order to complete the intended transaction, to employ the agency of their correspondents—other banking houses, carrying on business at a distance.

Thus, if A. employs his bankers to perform some duty for him, which can only be brought to a conclusion in some place at a distance, whether in this country or in foreign parts, so that it becomes necessary that his bankers should employ the agency of persons acting in such places, and a loss ensues from the conduct of the agents, whether direct or intermediate, who are so employed, and the question arises whether A. or the bankers are to bear that loss, in all such cases it is the bankers who must suffer; for, of the two, they are the parties whose conduct has led to the loss; for it was they who chose the agents, or who chose the correspondents who selected the actual agents; it is their act, therefore, which has led to the occurrences which have caused the loss, and that loss, as between themselves and A., they must be liable for; in other words, A. has a right of action against them, and will, in a Court of law, be compensated for the injury he has sustained. The bankers, however, will have a right of recourse against their correspondents, by whose laches or

default, either primarily or through the default of any one whom the latter may have entrusted with the business, the bankers have incurred the loss.

The following case well illustrates this position:—

A customer of a bank sends orders to his bankers to obtain for him payment of a bill of exchange, drawn by him on a person in Calcutta; the bankers accept the employment, and write him word that they had done so, promising to credit him with the amount of the bill when received. In the usual course they transmit the bill to their correspondents in London, by whom it is forwarded to the house of A., in Calcutta, to get payment; it is paid into A.'s, immediately after which they fail. The customer having been advised, by his bankers, that the bill was paid, they were held to be his agents to obtain payment, and it was also decided that, *ipso facto*, upon payment being made, they became liable to him for the amount received; and that any loss which might arise from the conduct of the bankers' sub-agents, between whom and himself no privity was established, must fall on the bankers (*a*). And the case was said not to be distinguishable from the case of a customer of a bank in London sending them a bill or cheque, with orders to get payment, and their clearing-house clerk, instead of returning with the balance, absconds; in which case the bankers would clearly be liable to the customer for the amount of the bill (*b*).

Also, the state of the accounts, between the customer's bankers and any of the correspondents they may employ in the transaction, can make no difference.

Hence, in all cases where a customer desires his bankers to obtain payment of a bill for him, and they do not refuse, or if a stranger makes the same request, and they agree to perform it, they are liable for the amount of the bill, whether, after remitting it to their correspondents, to get the payment, its amount is returned to them or not,

(*a*) *Mackersy v. Ramsay*, 9 Cl. & F. 818.

(*b*) *Per Lord Lyndhurst, C., id.* 848.

provided, in the latter case, the cause is the default of their correspondents.

Some country bankers pay the London banker, who acts as their agent and correspondent, a fixed annual sum for conducting their agency business. Others allow a commission on the amount of the transactions during the year. There are many country bankers who pay no commission, but leave a sum of money in the hands of their London agents, in the nature of a deposit, against which they are not permitted to draw. In such cases this sum is altogether withdrawn from the general account of the country banker, and placed to another, called the deposit account.

A question arising upon a remittance through a bank may be mentioned here, as one of great practical importance; viz., if a customer of a country bank, who already has a balance in his favour on his account with them, pays in a further sum of 707*l.*, with directions in writing that 500*l.* of it was to be paid into Messrs. Robarts' bank in London to meet a bill of exchange accepted by him, and the 707*l.* is carried by the country bank to his general account with them, and the 500*l.* is paid into Robarts', but, before the bill becomes due, the country bank stops payment; whether such 500*l.* is available for the general creditors of the country bank or is so specifically appropriated to be applied in a particular way as to remain the property of the customer at the time of the closing of the country bank; and the latter has been held to be the case (c).

Another case was, where one Ellerman, a merchant at Hull, kept an account with the Hull bank, upon the terms that they should procure Price and Co., their London agents, to accept on their credit bills drawn by the foreign correspondents of Ellerman against their consignments to him, and of which Price and Co. were advised by the Hull

bank. Ellerman paid the Hull bank a commission on the amount of the acceptances, and they paid Price and Co. a fixed annual sum for transacting their London business. When a bill was accepted by Price and Co., the Hull bank debited Ellerman with the amount, and they charged him interest from the time the bill was due. The Hull bank became bankrupt, and Price and Co. paid all bills accepted by them which were due after the bankruptcy; and it was held that the assignees of the Hull bank, and not Price and Co., were entitled to recover from Ellerman the amount of such bills (*d*).

Another transaction, between a bank in the country and its town correspondent, may here be mentioned, though no definite result was arrived at.

A bill of exchange for 400*l.* had been drawn by Cooke and Co., bankers at Sunderland, on Bruce and Co., bankers in London, (but had not been accepted by them,) payable at forty days, in favour of Herring, and by him it was indorsed generally to Burn, in satisfaction of a debt, and by him indorsed, before it was due, to Cooke and Co., in exchange for a draft for 1,080*l.*, being the amount of that bill and certain others, Burn being to a much larger amount indebted to them. Cooke and Co., instead of cancelling the bill for 400*l.*, remitted it, on the day of its date, but not indorsed by them, to Bruce and Co., their correspondents, it being their usage so to remit bills for the purpose of being written off. This bill, however, was not remitted direct in the usual manner, but sent, under cover, to one Alexander, a bill broker, through the medium of Simpson, a partner in the house of Bruce and Co. (the object being to save postage, as Simpson was an M.P.) Alexander was directed, by Cooke and Co., to get the bill discounted, and pay the proceeds to Bruce and Co., for their account. At that time, the sheriff was in possession of the shop and all the property of Bruce and Co., under an extent against

(*d*) *Barkworth v. Ellerman*, 6 H. & N. 605.

them, and on the arrival there of the parcel containing the letter (which was not sealed) and the bill, the officer opened the parcel, and took possession of the enclosure.

On these facts, it was doubted whether the banking house of Bruce and Co. had such a property as would support the affirmative of an issue, that Burn was indebted to the banking house in the amount of the bill (*e*).

Another consideration is to be mentioned, for the purpose of showing, that whatever may at first sight appear to be the case, there is, in truth, when the subject is correctly investigated, no hardship upon the banker implied in the operation of the principle above mentioned, in such circumstances as those of the last case. The banker voluntarily assumes a character, in which he holds himself out to the world as ready to transact certain well-known classes of monetary business, for all who choose to employ him, in consideration of reward. In that character he must be taken to have calculated the risk of losses which he may incur in course of his business, from the imprudence, the carelessness, the defaults, or the misfortunes of those whom necessarily, from the nature of that business, he must often employ in the conduct of it, and with whose characters, capacities and positions in life he often cannot necessarily have any but the slightest and most imperfect means of acquaintance. He must be taken to have calculated his risks, and calculated also the rate of reward, at which he will encounter those risks accordingly. If he has not done so, and if he fails to require such an amount of reward in his transaction of the business of his employers, as is in fair proportion to the degree of risk with which the business is attended, he fails to observe that degree of vigilance, in providing for his own interests, which the law demands, before it lends its aid to a sufferer. The banker is not a gratuitous agent; he cannot allege to his employer;—I reap no advantage from the performance of

(*e*) *Rex v. Burn*, 5 Price, 173.

your business; I have performed it with the same degree of zeal and caution that I should have exerted in my own; and, therefore, I cannot be responsible for the results; but being paid, he must be content to take the known risks, and must abide by the results, whatever they may be.

The following is a case equally consonant with justice:—

A customer of a bank accepts a bill, payable at the bank; the bill was drawn in favour of one A., and was casually lost by him. The banker has notice of the loss, but, nevertheless, afterwards discounts the bill, and afterwards debits the customer with the amount of the bill, writes a discharge on it, and hands it to the customer as his voucher. These acts are several acts of conversion by the banker, and A. may recover in trover, without any previous demand against the banker (*f*).

We may conclude by mentioning the following decision, which is one of practical utility:—A bill of exchange was sent by a bank in the United States to a bank in Toronto, Canada, for collection and remittance, accompanying which was a bill of lading for 10,000 bushels of wheat, which, on the bill of exchange being accepted by the drawees, was delivered over to them, they being the consignees named in the bill of lading: it was held, that it was not the duty of the bank in Canada, as the agent of the American bank, in the absence of special instructions, to retain the bill of lading until the bill of exchange was paid (*g*).

(*f*) *Lovell v. Martin*, 4 Taunt. 799.

(*g*) *Wisconsin Marine Company Bank v. Bank of British North America*, 10 Upper Canada, Law Journal, 151; it is the decision of the highest Court of Appeal in that colony.

CHAPTER VIII.

DEPOSITS OF SECURITIES.

WE will next trace the rules of law which regulate the obligations and rights of bankers, with respect to bills of exchange and other securities *deposited* with them by their customers and others. Questions of this nature commonly arise between the customer, or other depositor, on the one hand, and the assignees of the bankers, upon their bankruptcy, on the other.

Deposits for specified Purposes.—The primary or general rule is, that when a banker is employed as an agent, with whom undue bills are deposited by the customer, in order that the banker may receive the proceeds, when the bills become due, or for any other specific purpose (*a*), and the banker becomes bankrupt, having the bills entrusted to him remaining in specie in his hands, they continue the property of the customer, and do not pass to the assignees, and he may reclaim them in specie from the assignees.

But, on the other hand, if bills of exchange are remitted to the banker on the general account between him and the customer, and are not distinguished from the cash items of the account, they cannot be reclaimed by the customer from the assignees. In other words, if the relation of principal and agent was the relation of the customer and the banker, with respect to the bills at the time of the latter's bankruptcy, the customer may recover in trover from the assignees; if the relation had passed into that of debtor and creditor at the time of the bankruptcy, then the customer has no such right of action against the assign-

(*a*) *Belcher v. Campbell*, 8 Q. B. 11.

nees (*b*), although the customer might, of course, have sued the banker for the amount of the bills, as soon as they were entered *as cash* to the customer's credit, and the books of the banker would have been evidence against him on this point.

This general rule, that bills deposited or remitted for the purpose of the banker's receiving the proceeds when due, continue the property of the customer, if, at the time of the bankruptcy, they remain in specie in the hands of the banker, will be applied in all cases where there is no bargain between the customer and the banker, that, as soon as the bills reached the banker, the property in them should be changed; and such bargain cannot be inferred from circumstances which fail to show any consideration for the customer's assent, as it would be unreasonable in the banker to ask, and imprudent in the customer to accede, to such terms, in the absence of a consideration.

In one case (which has been fully confirmed) the course of dealing between the customer and the bank, and the usage of the banking trade throughout the county (of Lancaster), was shown to be in accordance with the following facts:—

The account, in the case in question, was kept in this form in the pass-book or banking book.

A. B. (the customer), in account with C. D. (the banker).

<i>Dr.</i>					<i>Cr.</i>				
1821.		£	s.	d.	1821.		£	s.	d.
July 4.—To Bank	..	80	0	0	July 1.—By Balance	1,300	0	0	
„ 5.—To draft	..	100	0	0	„ 2.—By Bills	..	750	0	0

At the end of every half-year an account was sent in to the customer from the banker. In the account of Christ-

(*b*) *Ex parte Oursell*, Ambler, 237; *Ex parte Sarjeant*, 1 Rose, 153, which are applications of the above rule of law to the several facts of those cases. The general rule is established by *Scott v. Surman*, Willes, 400; *Bolton v. Puller*, 1 B. & P. 539; *Thompson v. Giles*, 2 B. & C. 422; and confirmed in *Ex parte Atkins*, 3 M. D. & De G. 103; and in *Ex parte Barkworth, in re Harrison*, 2 De G. & J. 194; 27 L. J., Bank. 5.

mas, 1821, and also in the pass-book, a bill for 689*l.* 19*s.* (one of those in question, in an action of trover brought by the customer against the assignees of the bankrupt banker) was included, being one of several bills paid in on the 10th of December, 1821, and it formed part of the cash balance of 911*l.* 2*s.* 5*d.*, therein stated to be due to the customer. When the customers paid bills into the bank the usage was, that (provided the banker approved of the bills) they were never written short, but entered *on the day they were paid in*, both in the pass-book and in the books of the bank, to the credit of the customer, in the form above stated; and after such entry, the customer was at liberty to draw to the full amount appearing to his credit, by cheques on the bank. Bills disapproved of were not so entered, but were sometimes returned, sometimes deposited till due. *All bills so entered, whether made specially payable to the customer or not, were indorsed by him*, or if, for any private reasons, he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable as if he had indorsed. An interest account was kept, not in the pass-book, but in the books of the bank, in which the customer was debited with interest, on each cash payment to him, from the date of the payment; and on each payment in bills, from the period when the bills were due and paid; and, on the other hand, he had credit for interest from the date of each cash payment by him, and from the period when each bill paid in by him became due and was paid. As the accounts were balanced half-yearly, if a bill was paid in which did not become due before the end of the half-year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass-book, and this was the usual mode of keeping an interest account. If only the undue bills paid in by the customer were taken out of his account, in this case, as made up to the 31st of December, 1821, the customer's account would, at that date, appear

to be overdrawn; but some of the payments made by the banker to the customer were made in bills payable at future times, and some of them were also undue on 31st of December, 1821, and if all the undue bills on both sides had been taken out of the account, the customer would have been made creditor on that account.

At the period of the bankruptcy, the cash balance was in favour of the customer, exclusive of the bills in question. It was proved to be the constant usage and course of dealing of this bank and of others in the county of Lancaster, to use bills so paid in, by paying them away to their customers as they thought fit.

No direct proof was given that the customer, in this case, was acquainted with this practice, and the customer never received anything from the banker but cash, notes and bills, drawn by the banker upon his London agents (c).

On these facts and the usage above stated it was contended, that a bargain or contract between the customer and banker was to be inferred, to the effect that bills so deposited by the former were to become the property of the banker, upon reaching his hands. But the Court considered that, though it appeared to be the practice to carry the amount of the bills to the cash column of the account, the bills were entered, not as cash, but as bills (*d*); and that, although the amount was so carried to the cash column, it did not follow that the customer assented to their being considered as cash. That merely amounted to an undertaking on the part of the bank to answer cheques in advance, to the amount of the bills so entered. By indorsing the bills paid in, or by giving a guarantie when he did not choose to indorse, the customer might enable the

(c) *Thompson v. Giles*, 2 B. & C. 422. The usage of bankers was again stated to prevail in Lancashire to the above effect in *Ex parte Armitstead*, in *re Dilworth & Co.*, 2 Glyn & J. 379.

(d) *Thompson v. Giles*, 2 B. & C. 431, 432. Even if they had been entered as cash, *that* would have admitted of explanation; *Giles v. Perkins*, 9 East, 12; and the customer, even in that case, might be shown to be entitled to the bills. *Ex parte Sarjeant*, 1 Rose, 153, and *per Bayley, J.*, 2 B. & C. 430.

banker to negotiate the bills, and, in such case, a *bonâ fide* holder might have a right to retain them. But the banker could only be justified in negotiating them, when that was rendered a reasonable course, by the state of the customer's account. The custom or usage of bankers in Lancashire was stated to be, it will be observed, to use bills paid in by their customers; but it was not stated to be the usage that the bankers should so use the bills as their own, *without reference to the condition of the customer's account.*

On the whole of the case it was concluded, that there was no foundation for supposing a bargain to have been made, enabling the banker to use, as his own, bills deposited with him; and the customer recovered the bills from the assignees.

This decision, it will be observed, is in accordance with the general position:—if a customer put bills into his banker's hands, although that gives him a right to expect that his cheques will be honoured to the amount of the bills paid in, still they remain *his* property, subject to any lien the banker may have on them, to the extent of his advances (*e*).

The above decision received judicial recognition in a recent case in bankruptcy, as being in entire conformity with reason, good sense, and common honesty (*f*). There undue bills of exchange were from time to time remitted to his bankers by a customer and indorsed to the bankers. The course of dealing was, that the bills were not entered short, but though the bills were distinguished in the customer's account as bills, the full amounts were entered in the cash column under the dates on which the bills were paid into the bank, and the customer was at all times at liberty to draw cheques to the extent of the balance in his favour, as appearing on the account thus made out. In-

(*e*) *Per* Holroyd, J., 2 B. & C. 431, 433.

(*f*) *Ex parte* Barkworth, *in re* Harrison, 2 De G. & J. 194; 27 L. J., Bank. 5.

terest was allowed by the bankers upon the bills only from the time when their amounts were received ; and it was held, in the absence of evidence of the customer's acquiescing in or authorizing the bankers to treat the bills as their own from the times of their being paid in, that the bills remained the property of the customer, subject, however, to the lien of the bankers for their cash balance, and that the bankers had no right to negotiate them, unless the balance of the customer's account was in their favour ; and that on the bankruptcy of the bankers, such of these bills as remained in their hands in specie did not pass to their assignees, but, subject to the lien above mentioned, belonged to the customer. "The facts," said Knight Bruce, L. J., in delivering his judgment, "are not numerous (g). A firm of bankers has become bankrupt, and at the time of their bankruptcy they had in their possession short bills deposited with, or otherwise furnished to, them by one of their customers. The customer then said to the bankrupts : 'I am ready to pay you the balance against me on my account, upon its being ascertained, and I will relieve you from all liability in respect of your transactions with me or with my firm ; but return to us the short bills belonging to us which you hold.' To this the bankrupts, or rather their assignees, replied, 'No ; the bills now belong to us, and we have a right to retain them as part of the assets, and you must come in as a creditor for the amount.' To me," said the learned judge, "it appears that this proposition is as startling as a demand by a bankrupt to retain the plate or the title deeds which a customer has deposited with him for safe custody."

In Order and Disposition.—Bills under such circumstances are not in the order and disposition of the banker, within the Bankruptcy Laws ; for a banker, in this relation to his customer, is a factor for money, within the meaning of

(g) 27 L. J., Bank. 6.

the exception of factor in those laws (*h*); and it is well known that bankers receive bills as factors, or agents, to get payment of them when due.

Entering Bills as Cash.—The entry as cash in the banker's books of such bills would not, of itself, change the property (*i*); for a banker's books cannot be evidence for him, though they may be against him; and the assent of the customer to the bills being considered as cash, must be proved in such case; the *onus* of proving it being on the banker (*k*); also, it is hard to suppose that, by entering the full amount in the cash column of the account, the banker intended to debit himself presently with the whole sum to be received in future on the bills. In order to change the property, it must be shown that the banker bought the bills, or what is in general the same thing, discounted them; then the customer might have immediately sued the banker for the price which the banker had agreed to give for the bills, but still retained in his hands; and if the customer did not indorse the bills, and they were afterwards dishonoured, the banker would have no remedy against him (*l*).

In the pass-book in the above case, it will be observed, the bills were entered at the full amount, which does not tend to show that they were discounted; nor do the entries in the interest account tend that way. If it had been intended that the bills should become the property of the banker, they would have been entered as cash, deducting the discount.

Property in Bills not due.—It will be observed, to follow as a consequence of the rule above stated, that when

(*h*) 2 B. & C. 431, 433, *per* Lord Eldon, C., 1 Rose, 239, 253; *Bryson v. Wylie*, *per* Buller, J., 1 B. & P. 82, n.

(*i*) *Giles v. Perkins*, 9 East, 12; *Hughes v. Spooner*, cited in 2 B. & C. 425, and confirmed, *per* Holroyd, J., *id.* 431.

(*k*) *Ex parte Sarjeant*, 1 Rose, 153.

(*l*) *Per* Holroyd, J., 2 B. & C. 431, 433.

the property in bills not due, paid into a banker's, remains in the customer, if by any accident they are destroyed, without the default of the banker, the loss does not fall upon him, but upon the customer (*m*).

The rule itself prevails equally where the bills are deposited for any other specific purpose, as well as that of receiving the amount when due (*n*).

There is no doubt, however, that bills *may be paid in* under circumstances furnishing evidence of a transfer of the property in them, from the customer to the banker; that is a question of fact, to be determined by a jury upon the whole of the circumstances in evidence (*m*).

Short Bills—Entering short—Liability of Banker.—The terms “short bills,” and “entering bills short,” are very frequently met with in cases relating to the law of bankers, being technical expressions, used amongst persons engaged in banking: it is desirable, therefore, before proceeding further, to state the meaning that is attached to the words.

When, upon the receipt from a customer of an undue bill the banker does not carry the amount directly to the former's credit, as for a payment of so much cash into his account, but notes down the receipt of the bill in the customer's account, with its amount, and the time when due, in a previous column of the same page, he (the banker) is said to “enter those bills short” (*o*). And the bills, when so entered, are commonly said to be “short bills” (*p*). Though, whether they will be considered so by the Courts, does not depend upon the particular mode in which they are entered, but upon the dealings between the parties,

(*m*) *Per Best, J.*, 2 B. & C. 433. A similar opinion was given by the Judicial Committee of the Privy Council, in *Young v. Bank of Bengal*, 1 Deac. 681.

(*n*) *Belcher v. Campbell*, 8 Q. B. 11.

(*o*) *Giles v. Perkins*, 9 East, 12.

(*p*) *Ex parte Pease*, 1 Rose, 232, *per Lord Eldon*, C.

and the circumstances. Such bills, in the absence of special agreement between the parties to the contrary, or habits of dealing from which such agreement may be inferred, are considered in the nature of a deposit; the property in them is not changed; on the bankruptcy of the banker, with them in his hands, they may be recovered. Crediting the customer with their amount as cash, is not sufficient to change the property (*q*).

On the subject of short bills it may be proper to add, to what fell from the Court in the Lancaster cases, respecting the hazard which a banker runs, who has entrusted to him any valuable security for safe custody, or for any other special purpose, without authority to negotiate, transfer, or pledge, and, nevertheless, in violation of good faith and contrary to the object of the trust, he takes upon him to transfer, pledge, or in any manner convert such security, that a banker, appropriating short bills to his own purposes and use, would now be indictable for a misdemeanor under the 24 & 25 Vict. c. 96, s. 76; and a banker, who has pledged a short bill of a customer will be refused his order of discharge on his bankruptcy (*r*).

In some other cases, it has appeared to be the usage of some country banking houses to enter undue bills that are deposited to the credit of the customer, giving him either cash for them, or liberty to draw for the amount upon the bank, the customer always indorsing the bills. The practice of London bankers is to enter as above just stated. The difference between the effect of the two modes is this: the London banker, if the customer's account be overdrawn, has a lien on the bill deposited with him, though not indorsed. The country banker, who, under this practice, always takes the bill indorsed, has not only a lien upon it, if the customer's account be overdrawn,

(*q*) *Ex parte Dumas*, 1 Atk. 233; 2 Ves. sen. 582; *Zinck v. Walker*, 2 W. Bl. 1156; *Ex parte Atkins*, 3 M. D. & De G. 103; *Jombart v. Woollett*, 2 M. & C. 402; *Ex parte Barkworth, in re Harrison*, 2 De G. & J. 194; 27 L. J., Bank. 5.

(*r*) *Ex parte Sturt*, 4 De G. & S. 49; 24 & 25 Vict. c. 134, s. 159.

but has also his legal remedy upon the bill by the indorsement. It is to be observed, however, that under neither system does any lien accrue to the banker, until the customer's account be overdrawn. Moreover, if, at the time of the country banker's bankruptcy, the customer's balance be in his favour, he has a right to recover, *in specie*, all such bills of his, as are in the banker's hands (*s*), or have been pledged by the banker with a third person (*t*).

With respect, however, to the policy of depositing bills, indorsed by the party depositing, the following considerations must be attended to :—

Whether a bill is to be considered as intended to be discounted or deposited, does not depend on whether it is indorsed, but on the question whether it was the intention to make an absolute transfer, giving full power to go against all parties to the bill; *or* merely to enable the person with whom it is deposited to receive the amount from the other parties. Indorsement, however, is *primâ facie* evidence of the former (*u*).

The clearly settled rule is, that, if indorsed bills are deposited with a banker, and they are by him negotiated, and the banker afterwards becomes bankrupt, the original owner, who deposited them with the banker, who fails, can have no claim to recover them against the person holding them (*v*), and, moreover, he can only come in as a general creditor of the banker under his bankruptcy (*x*).

Lord Eldon more than once observed, when sitting in bankruptcy, that it ought to be generally known, that if bills indorsed are remitted to bankers, they may dispose of them effectually, though contrary to the faith of the under-

(*s*) *Giles v. Perkins*, 9 East, 12, 14. The presumption has been said to be that bills deposited with a banker are short bills. *Ex parte Armitstead*, 2 Glyn & J. 371.

(*t*) *Collins v. Martin*, 1 B. & P. 648.

(*u*) *Ex parte Towgood*, 19 Ves. 229.

(*v*) *Bolton v. Puller*, 1 B. & P. 546; *Collins v. Martin*, 1 B. & P. 648.

(*x*) *Ex parte Pease*, 1 Rose, 238; *Ex parte Wakefield Bank*, 1 Rose, 246.

standing between the parties, and the remitters can only come in as general creditors on the bankruptcy (*y*).

Permission to discount, given by the customer, for the purpose of reducing the balance, when the banker shall be in advance, is a circumstance controlling his absolute authority over the indorsed bills of his customer (*z*).

It is to be remembered also, that as, on the one hand, writing bills short is only evidence (*a*) to be rebutted by proof of the intentions of, or actual bargains or contracts between, the customer and banker; so, on the other hand, the circumstance of the bills *not* having been written short amounts to nothing, to show they were taken as cash, "unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties, that they were to be considered as cash" (*b*). Hence, in a case where such bills were entered, bills and cash together, in the running account, without distinction, in the absence of evidence to show *aliunde* that they were mutually considered as cash, Lord Eldon appears to have thought, that the customer was entitled to the bills, on the bankruptcy of the banker (*c*).

Again, if there be a letter accompanying the remittance of bills, and giving directions as to how they shall be dealt with, that is evidence of intention, which cannot be got rid of by the subsequent unauthorized act of the banker in entering the bills short (*d*); for the books of a banker, not communicated to those dealing with him, are not evidence for him; though they may be evidence for them (*d*).

Where certain short bills, drawn before, but not payable till after, the bankruptcy of a firm of Lancaster bankers took place, had been deposited with the bankers, and by

(*y*) *Ex parte Pease*, 1 Rose, 238; *Ex parte Wakefield Bank*, 1 Rose, 246.

(*z*) *Ex parte Leeds Bank*, 1 Rose, 254.

(*a*) *Ex parte Pease*, 1 Rose, 239; 19 Ves. 25.

(*b*) *Per* Lord Eldon, C., *Ex parte Sarjeant*. 1 Rose, 154.

(*c*) *Ex parte Sarjeant*, 1 Rose, 154, commented on by Bayley, J., 2 B. & C. 430; and by Turner, L. J., 2 De G. & J. 194; 27 L. J., Bank. 5.

(*d*) *Ex parte Pease*, 1 Rose, 239.

them negotiated with their correspondents in London, before the bankruptcy, the proprietor was entitled to be indemnified, by the London bankers, from the surplus securities which they had taken from the Lancaster bank (being title deeds), after satisfying their own lien on those securities. It ought to be stated, that the London bankers had given credit to the Lancaster bank for the amount of the bills in reduction of their claims upon the Lancaster bank, also the balance of account between the customer, who was owner of the bills, and the Lancaster bank had always been in his favour (*e*).

The result of this decision is to show that, notwithstanding the usage, Dilworth & Co., the bankers, had no right to dispose of the bills, as they did, by transmitting them to the London bankers, and that although bills deposited in like circumstances had been in the half-yearly accounts sent to the customer since the commencement of his account with the bank in 1822 considered as cash, *without objection on his part*, that did not amount to a permission to discount or negotiate (*e*).

In a second case, arising on the bankruptcy of the same firm of Dilworth & Co., of Lancaster, it was ruled, that a customer was not entitled to recover short bills in the hands of his bankers on their bankruptcy, where the habit of dealing between the parties was such as to warrant an inference that they mutually considered and treated such bills as cash. The bills in question were indorsed by the customer generally, and paid into the bank, and indorsed by the bankers to their London correspondents. These bills were drawn previously to, but were not due until after, the bankruptcy (*f*).

Bills remitted for Sale.—So, whenever bills of exchange are remitted for sale, and the proceeds are directed

(*e*) *Ex parte Armitstead*, 2 Glyn & J. 371, 379.

(*f*) *Ex parte Thompson, in re Dilworth*, 1 Mont. & M'A. 102; see also *Ex parte Benson, in re Dilworth*, 1 Deac. & C. 438.

to be applied to a specific purpose, the property in the bills remains in the remitter, until the purpose for which they were remitted is satisfied; and, moreover, the value of the bills may be recovered from the purchaser of the bills who had notice of the purpose for which they were remitted, and of the misapplication of the proceeds by the agent. The bills, in the case in which this doctrine was recognized, were not indorsed (g).

A sale of bills of exchange, by a factor, is precisely the same in principle, and must be dependent on the same rules of law, as a sale of a bill by a banker; and may, therefore, here be cited in illustration of the foregoing statements, and as elucidating this part of the law of banking.

A foreign merchant remits bills to his factor in London, with directions to sell them, advising him, at the same time, of his intention to draw for the proceeds. The factor receives the bills and sells them, but before the receipt of the purchase-money becomes bankrupt and dishonours the merchant's drafts for the amount of the bills. The sale in London, of foreign bills of exchange, usually (the report states) takes place on foreign post-days, and it is the custom of merchants not to pay the purchase-money until the foreign post-day next after the day of sale. In this case the bills were remitted on the 21st of March, on the 28th they were sold, and the price, according to the above custom, would have been payable on the 31st: on the 30th, the factor stopped payment: on the 20th of April following a fiat issued. Here the merchant, and not the assignees of the factor, were held to be entitled to the proceeds of these bills, notwithstanding the bills had been indorsed both by the principal and the factor, and were sold by the factor in his own name. The factor did not receive a *del credere commission*, nor did he take upon himself any liability, in case of nonpayment of the purchase-money, in

(g) *Muttyloll Seal v. Dent*, 8 Moore, P. C. 319.

respect of such bills, but was accustomed on such sales to inform the principal of the names of the purchasers (k).

The following are the facts of a case of celebrity, the judgment in which lays down principles that have always been considered fundamental in this branch of the law:—

John Bolton was a merchant at Liverpool; John Forbes and Daniel Gregory for some years and until they became bankrupt were co-partners, and carried on business as merchants in London, under the firm of Burton, Forbes, and Gregory. On the 1st of May, 1774, Forbes and Gregory entered into partnership with one Charles Caldwell and one Thomas Smith, in the trade and business of bankers, to be carried on at Liverpool, under the firm of Charles Caldwell & Co., and so continued to trade until that house became bankrupt. The house at Liverpool had dealings and transactions with Forbes and Gregory, carrying on business as merchants under the firm of Burton, Forbes and Gregory, in London, and between the two houses in Liverpool and London there was an open account current. Bolton, for some years, and until the house at Liverpool became bankrupt, employed that house as his bankers; and they used to procure bills, which had been accepted by him, payable at the house in London, to be there paid when they fell due. Those payments, when made, were carried by the house in London to their account with the house at Liverpool, and by the house at Liverpool to their account with Bolton. In the banking account between Bolton and the house at Liverpool, Bolton was made debtor for cash received of them, and for bills accepted by him, payable at the house in London; and was credited in such account for all bills and cash paid by him into the said house. An interest account was kept between Bolton and the house at Liverpool, which was balanced every three months; and the latter was also allowed a profit on the said account of one quarter per

(k) *Ex parte Pauli*, 3 Deac. 169. The judgment was rested on *Scott v. Surman*, Willes, 400.

cent. on bills and cash paid, either by them or by the house in London on their account for the use of Bolton. Bills having been accepted by Bolton to the amount of 19,702*l.*, payable at the house in London, he on the 28th February, 1793, proposed to the house at Liverpool, that they should procure the same to be paid as they fell due by the house in London, and that to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange, with his endorsement thereon; to this proposal the house at Liverpool agreed. In pursuance of this agreement, Bolton on the 1st of March, 1793, and on other days between that day and the 16th of March in the same year, delivered to the house at Liverpool several bills of exchange, amounting in the whole to 11,583*l.* 2*s.* 9*d.* Among these was a bill for 4,000*l.* On the 16th of March, 1793, he delivered to the same house other bills, with a cheque on that house (which they received as cash) to the amount of 912*l.* 1*s.*; among these was a bill for 398*l.* 18*s.* 3*d.* All these bills were the property of Bolton, and duly indorsed by him; the bill for 4,000*l.* having also, previously to the delivery, been accepted by him. On the 4th of March, 1793, the bills accepted by Bolton, payable at the house in London, were, by the house at Liverpool, entered on the debit side of the account between them and Bolton; and the bills delivered by Bolton to the house at Liverpool were by them carried to his credit in the same account, at the times when they were respectively delivered. On the debit side of the books of the house at Liverpool it appeared that Bolton's acceptances, amounting to 19,702*l.* 13*s.* 10*d.*, were entered thus:—"March 4th, fifty-five acceptances due in April, 19,702*l.* 13*s.* 10*d.*;" and on the credit side, the bills delivered to the house by Bolton were entered, some with the date of their delivery, and the day on which they were to fall due, and some with the former only. On the 2nd of March, 1793, the house at Liverpool remitted the above-mentioned bill for 4,000*l.*, together with other bills

to the amount in the whole of 30,000*l.* and upwards to the house in London to be carried to the account of the house at Liverpool; and on the 16th of March, they remitted the above-mentioned bill for 398*l.* 18*s.* 3*d.*, together with other bills amounting in the whole to 8,000*l.* and upwards to be carried to the same account. This last bill for 398*l.* 18*s.* 3*d.* was received by the house in London on the 18th of March, 1793. Some of the bills delivered by Bolton to the house at Liverpool were negotiated by them, and the value received to their own use. On the 28th of February, 1793, and thence till the bankruptcy of the house at Liverpool, the house in London was largely in advance to the house at Liverpool. On the 16th of March, 1793, the house in London became insolvent, and on the 18th of the same month, a commission of bankruptcy issued against them, under which the present defendants were assignees. On the same day the house at Liverpool also became bankrupt, and a joint commission of the same date issued against Charles Caldwell, Thomas Smith, John Forbes, and Daniel Gregory, as partners in the banking house at Liverpool. The house at Liverpool, at the time of their bankruptcy, was indebted to Bolton in 2,000*l.* and upwards; and none of that parcel of bills, amounting to 19,702*l.* 13*s.* 10*d.* accepted by Bolton, payable at the house in London, was paid either by that house or by the house at Liverpool, but was paid by Bolton himself. The defendants possessed themselves of the two bills in question, as assignees of Forbes and Gregory, and refused to deliver them on demand.

On these facts Bolton brought an action of trover against the assignees of Forbes and Gregory, to recover the bill for 4,000*l.*, and also the bill for 398*l.* 18*s.* 3*d.*, but failed; after much deliberation, the Court laying down the principles—1. Bills in the hands of a banker, in the event of a bankruptcy, are to be delivered up, subject only to the lien which the banker may have upon them, for the balance of his account. 2. If indorsed bills are deposited with a

banker, and are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person: held, the true nature of the transaction to be this—that Bolton paid into his bankers' hands these bills, on his general account, for a particular purpose, viz., that the bankers might be enabled to provide for the payment of his acceptances in London. They were to be dealt with as the bankers thought fit to deal with them; to be negotiated if they thought fit; to be discounted at Liverpool if they pleased, or remitted to whom they pleased, and were necessarily to be converted into money, in order to be means effectual to the purpose of the deposit. Forbes and Gregory were parties capable of acquiring a property in these bills, as capable as any third party; and must, therefore, be considered as third parties, with whom these bills had been negotiated. Therefore the case belongs to the second class of cases mentioned above, and Bolton could not recover against the assignees, who stood in the same position as Forbes and Gregory themselves (i).

The following is a case of the deposit of a bill of exchange with bankers, by a person who was not a customer or person having an account with them:—

A. deposits with bankers at Sheffield a bill of exchange, dated Madras, October 19, 1842, drawn upon Fletcher & Co., London, payable at thirty days' sight, which had been remitted to A., indorsed to his order. On the 12th December, 1842, A. inquired at the bank at Sheffield, how he was to procure payment of the bill, and was informed by a clerk that the bill must be sent up to London, and remain there till it was paid. The clerk told A. to indorse the bill, and call again on the 16th January, 1843, at the bank, when he might expect to receive the amount of the

(i) *Bolton v. Puller*, 1 B. & P. 539.

bill. The bank made no advance on the bill, but indorsed it specially to their London agents, in whose hands it was when they (the Sheffield bankers) became bankrupt, the fiat issuing on the 16th January, 1843. The amount of the bill was received, by the London agents, on the 18th of that month, and was placed by them to the bankrupts' credit. On these facts the decision was, that the proceeds of the bill, after satisfying the lien of the London bankers, for any balance that might be due to them from the Sheffield bank, must be paid to A.; and if there were other depositors of bills, under similar circumstances, according to the rule in bankruptcy, the proceeds of all the bills were to be distributed rateably among them, without any preference of one over the other (*k*).

Relation of Banker and Country Correspondent.—Having thus discussed the relations, rights and liabilities of customer and banker, depositing bills with the latter, and having touched upon a case of the same kind between a banker and a stranger, it remains to notice what are the relations, in similar circumstances, when dealings between the banker in the country and his London correspondents are added to the former simple relation of banker and customer. Now here, notwithstanding the general rule, that indorsed bills of exchange deposited by the customer with his banker are at the absolute disposal of the banker, and though the customer, on the bankruptcy of the banker, may recover in specie such of them as remain in the banker's hands, subject to the banker's lien in respect of advances, though he cannot follow the proceeds if they have been converted, yet this absolute property of the banker in the bills may be qualified by circumstances.

Thus, if a customer deposits indorsed bills with his country banker to obtain payment of them, and the banker

(*k*) *Ex parte Froggatt*, 3 M. D. & De G. 322.

remits them to the London bank, who are his correspondents, to receive and pay bills, and as such agents have an allowance from him for so doing, and then the London bank becomes bankrupt, with the bills remaining undue in his hands; the assignees, upon receiving the proceeds of the bills, must pay them over to the country bank, subject to the lien of the London bankers for anything remaining due from the country bank to them upon the contract between them; the London bankers being the paid agents of the country bank for this purpose, of getting bills paid and remitting the proceeds, and their power over the bills being limited to that purpose.

The same would be the case if the London banker, in the annual account between him and his correspondent in the country, there being no proof of agency, had entered the bills as the property of the correspondent. In the former case he would be considered as the factor of the country banker; in the latter, there is raised an express declaration of trust (1).

Such, then, are the relations of country banker and correspondent, in case of the bankruptcy of the London correspondent. The result to the customer remains to be inquired into.

Now, it manifestly would be unjust, that the customer should be affected by the bankruptcy of an agent, whom he has no voice in selecting, or by the state of the accounts between his banker and that agent; therefore, although the country banker receives the proceeds of the bills, *minus* the sum requisite to satisfy the London banker's lien for advances (if any), and to indemnify the estate against acceptances or other engagements, which the London banker is under at the time of the bankruptcy on account of the country bank, a sum equal to the whole amount of the proceeds of the bills must be paid by the country banker to the customer (subject of course to the state of the cus-

(1) *Ex parte Pease*, 1 Rose, 232; *Ex parte Wakefield Bank*, 1 Rose, 243.

tomers' account); for so only can his contract with, or duty to his customer, be performed.

So, in another case, where bills were remitted by a country bank to their correspondents in London, and stood, at the bankruptcy of the latter, entered short, not being then due, it was ordered, on petition of the country bank, that the bills should be delivered up to them by the assignees. The country bankers, in this instance, were not creditors of the London bankers when this petition was first presented, the cash balance being against them, but had since become so, turning the balance in their favour, by taking up the acceptances given by the London house on their account(*m*). The country bankers must have accounted to the customer, who deposited the bills with them, for the entire proceeds of them.

The following is a case of bills deposited by country bankers with their London bankers, on which the London bankers had a lien, and on which they were, therefore, held entitled to recover against the acceptor (who stood in the character of surety for the country bank), by virtue of the lien.

A banking house at Abingdon, being indebted to their London correspondents, are urged by them to send them up any bills they could procure. Accordingly they sent up two bills *for account*, which had been accepted by A. *for their accommodation*, and which became due respectively the 19th March and the 19th April, 1814, each of them being dated the 13th December, 1813. The balance of the cash account, on each of the two first-mentioned dates, was considerably in favour of the country bankers. There were also periods subsequent to those dates, when the general account was in favour of the Abingdon bankers, but they afterwards failed, being at that time indebted to the London bankers in a sum exceeding the principal and interest of the bills. The Court at Nisi Prius held the

(*m*) *Ex parte Rowton*, 1 Rose, 15; 17 Ves. 431; *Ex parte Buchanan*, 1 Rose, 280; *Ex parte Burton Bank*, 2 Rose, 162.

meaning of the expression "for account," to be *for the then floating account*; and it was remarked, "There was a period when the lien on the bills of the London bankers, ceased to attach, and when the bills might have been redeemed; but they were not reclaimed, and by allowing them to remain in the hands of the London bankers, their lien revested when, upon fresh advances made, the balance turned in favour of the London bankers." The action was brought by the London bankers against the acceptor, in virtue of their lien, and by way of enforcing and realizing it; and there having been a verdict in their favour, the Court in banc confirmed the verdict (*n*).

The following is a case which may fitly have a place here, in connexion with the subjects above discussed, and with the last case:—A. accepts four bills for the accommodation of B. B. indorses and deposits them with his bankers, as a collateral security for his floating balance with them. B. becomes bankrupt, when the bankers proved for a balance greatly exceeding the amount of the bills, exhibiting in their proof these four bills, among others, as securities then held by them, and they afterwards received a dividend of two shillings in the pound on the amount of their proof. The bills were subsequently paid in full by A.: and it was held, that the bankers were bound to refund to A. the dividend of two shillings on the amount of the bills (*o*).

The decision on the following facts illustrates the relation of country banker and London correspondent, when the former deposits with the latter a security by way of *pledge*.

A customer gives his promissory note to his bankers, to secure repayment of advances. They become bankrupt, but, at that time, the customer holds bank notes of their bank to a greater amount than his promissory note, which he had all along reason to believe was still in the posses-

(*n*) *Atwood v. Crowdie*, 1 Stark. 483.

(*o*) *Ex parte Holmes*, 4 Deac. 82.

sion of the bankers. In fact they had deposited it, by way of pledge, with their London correspondents. The London bankers enforce the payment of it from the customer of the country bank, the maker of the note; but the securities, in the hands of the London bank, were altogether more than sufficient to cover what was due to them from the bankrupts, and the surplus is returned to the assignees.

Held, that as the customer might have set off the notes he held against the note in the hands of the bankrupts, he was entitled to recover its amount from the assignees. The promissory note was payable on demand, with interest. The case is singular in its circumstances. It is obvious that the customer, thinking that his promissory note was still in the hands of the bankers, and therefore taking their notes, in the way of business, which he might not have continued to do if he had known that they had parted with his promissory note, was put in a different situation by their conduct. In a certain sense, too, the property in the promissory note had never left the bankrupts; they had only parted with the possession of it by way of pledge; then the question would be, whether the case did not come strictly within the terms of the class of mutual credit in 6 Geo. IV. c. 16, s. 50 (replaced by 12 & 13 Vict. c. 106, s. 171), though the ultimate decision did not depend wholly on that question (*p*).

Bills deposited by Strangers.—Several of the examples cited above have been cases where short bills have been deposited by customers; it being the law, as above stated, that bills are considered short, not merely from the fact of their being entered so, but from a consideration of the habits of dealing between the parties, and all the circumstances.

The following is an instance of a decision upon facts

(*p*) *Ex parte Staddon*, 3 M. D. & De G. 256.

somewhat different ; where, viz., the bills were not short bills, and the party depositing was not a customer:—A person deposits with bankers two bills (one for 600*l.* and the other for 400*l.*) indorsed by him ; it being agreed that he should draw for the amount of 1,000*l.*, the bankers refusing to discount them ; he, in fact, only draws to the amount of 65*l.*, and the bankers employ a broker to discount the bills ; and then become bankrupt in less than three weeks after the bills had been deposited with them. It was not the usage of the bankers to treat any bills paid in by a customer as short bills ; but to consider all paid in by any person as the property of the bankers, and to be paid in on the customer's general account ; and in keeping their accounts they had not, like many other bankers, a cash column and a bill column, in their books, but it was their practice to blend both bills and cash ; these were entered as bills. There was no cash balance, in favour of the person who paid in these bills, at the time of the bankruptcy, and no evidence of any other banking account in his name, but *that* on the bills. It was part of the above agreement for his drawing, &c., that he was not to draw out the amount of the 400*l.* bill until the 600*l.* bill was paid. He was held to be entitled, on the bankruptcy, to the proceeds of the bills (*q*).

Here, it is evident, the property in the bills had never passed from the depositor ; he was led to consider that the bankers would not buy them ; their discounting them afterwards was without his knowledge ; he would have been entitled to the bills, if they had remained in specie, in the hands of the bankers.

East India Bills.—Hitherto the facts, in the various cases cited, have arisen respecting ordinary bills of exchange ; the following was the case of a deposit of East India bills for safe custody.

(*q*) *Ex parte Edwards*, 2 M. D. & De G. 625.

On the 6th July, 1836, A. B. deposited with her bankers at Carlisle, for safe custody, certain East India bills, specially indorsed by her, with instructions to receive the amount when due; the indorsement being made merely for the protection of the property. East India bills, in general, are negotiable in the market, like common bills of exchange, and would, therefore, in the ordinary course, be only deemed securities. The balance of A. B.'s account, exclusive of the amount of the bills, was then in her favour, and continued so up to the bankruptcy of the bankers. They charged discount on the bills in their account with her, and she might have drawn on them for the amount of them, it being the custom of the bankers of Carlisle to consider ordinary bills, so deposited, as cash. The *fiat* issued on the 23rd November, 1836. The bankers paid away the bills to a creditor, with whom the assignees afterwards settled an account, charging him with the amount of the bills, and receiving from him the balance due to the estate. Here the bankers acted in express violation of the directions under which the bills were deposited, and A. B. was held to be entitled to be reimbursed the whole amount of the bills from the assignees. It would not have made, it appears, any difference, if she had overdrawn her account. These East India bills were drawn (or signed by order of the Governor in Council of Bombay) on the Court of Directors of the East India Company, and were on account of the principal of the Bengal Six per Cent. Remittable Loan of 1822 and 1823, payable the 18th January, 1837, so that they never were intended, by the parties to them, to be considered in the light of common bills of exchange (*r*).

The reason why it would not have made any difference in this case, if the account had been overdrawn at the time the bankers disposed of the bills, appears to be this:—Where bills, &c., are remitted to a person for a

(*r*) *Ex parte Bond*, 1 M. D. & De G. 10.

specific purpose, he is bound to perform that purpose, or return the securities; if he receives the amount, contrary to the directions of the remitter, he cannot apply it to the payment of his own debt; therefore, if the account of A. B. had been overdrawn, it would not have been an excuse for the bankers to say, they had sold or discounted the bills, or paid them away, and carried the amount to the customer's account, and applied it in reduction of her debt to them (s).

Bank Post Bills.—So, if a person goes to his banker, and says, here are 1,000*l.*, in Bank of England notes, get me a bank post bill for them; the banker cannot receive them silently, as though acquiescing in the object of the customer, and then set up his lien and apply them in reduction of the balance, against the customer, on his account (t).

Then, such expressions, used in the letters of remitters of bills or otherwise, as, that they expected the banker “to do the needful” (u), or “to cover us in due time” (x), do not enlarge the powers of the banker, or constitute a special contract, authorizing him to deal with the bills as his own, or relieve him from the obligation of retaining the bills till due, if remitted to receive payment of them.

So where a bank post bill had been remitted, by a customer to his bankers, with a letter desiring them to place it to his credit, and to send him a receipt, and credit had been given him, in his account, for the amount of the bill, and a receipt given him in the same way as if it had been a cash payment; the bank post bill, as is mostly the case for the sake of security, when bills are sent into the country, was unaccepted. Now, in such a case, if the

(s) *Ex parte Brown*, 3 Deac. 91, which case also recognizes the principle that bills remitted, clothed with a trust, do not pass to the assignees on the bankruptcy of the recipients.

(t) See observations by Lord Lyndhurst, C. and Lord Brougham, in *Brandao v. Barnett*, 12 Cl. & F. 802.

(u) *Ex parte Smith*, Buck. 355.

(x) *Jombart v. Woollett*, 2 M. & C. 389.

customer had drawn a cheque upon the bankers for a sum exceeding his balance, supposing the bank post bill, for which he had credit in the bankers' books, were not reckoned, and the bankers had refused to honour the cheque in respect of that deficiency, it seems probable that an action, such as it has been already shown a customer, who has an undoubted balance in his favour, may maintain in general on refusal to pay his cheque, could not have been supported; for the bankers might have answered truly, that an unaccepted bill, though of the Bank of England, payable seven days after sight, is, for many purposes, not equivalent to cash; and, in fact, their duty had been performed by transmitting the paper to London for acceptance, and raising the money upon it within a reasonable time. It was apparently, though with hesitation, concluded, therefore, that the bank post bill had never become vested, as property, in the bankers; in other words, it was never in the character of cash between these parties; the ordinary relation of banker and customer remaining between them not regulated or qualified by any particular agreement, express, or to be inferred from circumstances or habits of dealing. The customer, therefore, was entitled to the proceeds as against the assignees (*y*).

Debentures.—So where debentures for tontine annuities were deposited with bankers, and their assignees claimed a lien on them, and one of the bankers had received the dividends upon the debentures: it was held, that the deposit was in the nature of a trust, and the debentures were not, therefore, in the order and disposition of the bankers at the time of their bankruptcy (*z*).

(*y*) *Ex parte Atkins*, 3 M. D. & De G. 103. There is some doubt as to what is the precise character of bank post bills. In *Forbes v. Marshall*, 7 Exch. 166; 24 L. J., Exch. 305, they were considered by Pollock, C. B., and Alderson, B., to be bills of exchange; by Martin, B., to be promissory notes.

(*z*) *Ex parte Douglas*, 3 Deac. & C. 310.

Bills and other Property in reputed Ownership of Bankers.—Mention has been made (a) of the position that bills of exchange, remitted to a banker, clothed with a trust, do not pass to the assignees upon the bankruptcy of the banker, as they would do if they were, in such case, within the doctrine of reputed ownership (b); but, nevertheless, under all other circumstances, bills of exchange, placed in the hands of a banker, will so pass. For instance, if A., who has had no previous dealings with a banker, in the country, applies to him to give him a bill, on London, for three bills of exchange, of which the applicant is holder, and the banker does so, and the bill given by the banker is afterwards dishonoured, this transaction is a complete exchange of securities, and trover will not lie at the suit of A. for the three bills; and, even if the exchange had not been absolute and complete, the banker having become bankrupt, the three bills, having come to the hands of the assignees, must be considered as goods and chattels in the order and disposition of the bankrupt, at the time of his bankruptcy, within the meaning of the bankrupt law. For the bills were indorsed to the bankers, who had the power of disposing of them, and, in like manner, A. had a similar power over the bill handed to him in exchange: and the former, being negotiable securities, and having remained in the hands of the bankers until their bankruptcy, seem necessarily to have been held within the doctrine. The case was held to be quite distinguishable from that of bills deposited by a customer clothed with a trust, for trust property is always considered not to be within the principle of the bankrupt law in this respect (c).

But it is not only when bills of exchange or other secu-

(a) See *supra*, p. 142; *Ex parte Brown*, 3 Deac. 91.

(b) 6 Geo. IV. c. 16, s. 72; replaced by 12 & 13 Vict. c. 106, s. 125.

(c) *Hornblower v. Proud*, 2 B. & A. 327; *Edwards v. Glyn*, 2 El. & El. 29; 28 L. J., Q. B. 350; 5 Jur. N. S. 1397.

rities are deposited, for a specific purpose, with bankers, that the property remains in the depositor; there is another class of cases, where money paid into a bank may, under certain circumstances, remain the property of the party paying in, and be, therefore, recoverable on bankruptcy from the assignees.

Thus, where a person had deposited, after banking hours, a large sum of money with the manager of a provincial bank, at the banking house, the manager knowing that the bank was on the eve of stopping, though no resolution to that effect had been, in form, come to by the bankers, and he had put the money in a place by itself, separately from the funds of the bank, and the bank never after that day opened for business: it was held, by Lord Tenterden, C. J., that the depositor was entitled to recover from the assignees (*d*).

So where it was the usage of a banking house, that money, paid in after banking hours, should be put into a separate place of deposit, and entered in a counter book, but not carried to the customer's account till the next day; and a customer paid in a 500*l.* Bank of England note after banking hours, and the banker, having before resolved not to re-open for business, put the note in a separate place, and next morning stopped payment and became bankrupt, the customer recovered from the assignees, the bank note being held to remain his property.

It may be further observed, that the usage was for the customer to be considered to be entitled to draw upon money so paid in, at the opening of the bank, on the following morning. The counter book was a book in which an entry was made of all monies paid in to the bank, as the same was paid in, and was always resorted to, to ascertain whether money had been paid in by a customer during the day, before a cheque of such customer was dishonoured. The bank note was not entered in any

(*d*) *Threlfal v. Giles*, cited 2 M. & Rob. 492.

other book of the bank, nor was it in any way carried to the account of the customer, or entered in his pass book, and never was mixed with the assets of the house (e).

A sum of money, consisting partly of Bank of England notes and country bank notes, partly of cheques on country bankers, and partly of coin, was, after banking hours on a Saturday evening, placed in the hands of the manager of the bank, at the banking house, where he resided, and he gave a receipt, *with the words*, “*to be accounted for on demand*,” for the same, dated as of the following Monday; they were not entered in any of the bank books by the manager, or in any way mixed with the bank monies, but were placed by the manager in a bag, in which there was nothing else. The bank never opened again for business. The partners in it were afterwards made bankrupts: the money so deposited was held, in bankruptcy, to pass to the assignees (f). In this case, however, the manager was in the habit of receiving deposits after banking hours, and the customers, from whom the above-mentioned deposit was received, were in the habit of making deposits after the bank had closed, and such deposits had always been treated, by both parties, as if they had been regularly made. One of the partners had already resolved to commit an act of bankruptcy, and, on the same evening of Saturday, did commit an inchoate act, unknown to the other and remaining partner; the firm did not become bankrupt until the Monday.

If money be remitted to, or deposited with, a banker, by a customer, for the special purpose of paying certain bills, accepted by the customer, and about to become due, and the bankers, without making any communication to the customer, dishonour the bills, the balance on the customer's account being against him at the time, and the

(e) *Sadler v. Belcher*, 2 M. & Rob. 489.

(f) *Ex parte Clutton*, 1 Fonb. 167; see *Sadler v. Belcher*, 2 M. & Rob. 489, the difference between the two cases is, that, in the latter, the determination to commit an act of bankruptcy had been taken, by all the partners, before the money was paid in; moreover, no receipt was given.

customer afterwards become bankrupt, and his assignees bring an action against the bankers for the injury caused to the bankrupt by their conduct, and obtain a verdict for a sum equal to the amount due on the bills: it will be held, in bankruptcy, that they are entitled to retain this sum against the holders of the bills, who will, however, be allowed to prove (*g*).

A customer, being indebted to his bankers, deposited with them securities, which they afterwards assigned without giving him notice, and then became bankrupt. In a suit by him in Chancery, against the assignees of the securities, it was held, that he was entitled to set off the monies due to him on his running account against the debts due from him, and that the assignees had merely the rights of the assignors, and could claim no advantage beyond what the bankers were entitled to (*h*).

B. was in the habit of drawing bills of exchange on H. & Co., bankers, and of remitting bills to H. & Co. to an amount fully sufficient to meet their acceptances. H. & Co. afterwards become bankrupt. At the time of their bankruptcy there were in the hands of holders for value undue bills to a large amount, drawn by B. upon H. & Co., and accepted by them; but H. & Co. had misappropriated the greater part of the bills which had been remitted to meet them; it was held, that B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bankruptcy, but that they must be applied so far as they would extend in payment of the bills accepted by H. & Co. (*i*).

Stock or Bonds.—Cases of fraudulent disposal, by bankers, of stock or bonds belonging to customers, sometimes occur, in which they have attempted to repair the injury done to the customers, by substituting securities of their own in the place of the securities with which they

(*g*) *Ex parte Sparkes*, 1 Fonb. 51.

(*h*) *Cavendish v. Geaves*, 27 L. J., Chanc. 314; 24 Beav. 163.

(*i*) *Ex parte Carrick*, 2 De G. & J. 208.

have improperly dealt, but such attempts are, for the most part, wholly ineffectual, in the case of bankruptcy, as against the assignees.

Thus, where a customer of a bank was owner of 16,000*l.* Navy Five per Cent. Stock, which stood in the name of one of the partners of the bank; and the partner sold out the whole of the stock, and applied the proceeds to the purposes of the banking house; at the same time enclosing in an envelope certain bonds belonging to the house, together with a memorandum to this effect—Borrowed and received of J. Balfour, Esq. (the customer) 16,000*l.* Navy Five per Cents., which we promise to replace; and we have deposited with him, as collateral securities, these bonds of the Earl of Oxford and Mortimer, and others, which we promise to assign when required,—and sealing up the bonds, and writing on the envelope, “The property of J. Balfour, Esq.” This packet was deposited in an iron chest, among securities belonging to other customers. In the evening of the day before the bank stopped payment, this packet was sent to the customer, who then first learnt that the stock had been sold. But it was held, that as the possession of the bonds had never been out of the bankers till the very eve of the bankruptcy, when the bankrupts could not give a preference, the customer had no lien on the bonds, but must give them up to the assignees (*j*).

But where bonds payable to bearer were deposited for safe custody, and the bankers afterwards fraudulently deposited them with their brokers, without notice that the bonds belonged to a third person, as a security for advances, and then became bankrupt, the bonds are subject to the general lien of the brokers for all their advances (*k*).

Title to Goods.—Generally, as to the deposit of goods by way of security, a banker is bound, at common law,

(*j*) *Wilson v. Balfour*, 2 Camp. 580.

(*k*) *Jones v. Peppercorn*, 28 L. J., Chanc. 158; Johns. 430.

to take care that the person depositing is entitled to the goods; otherwise the banker may at any time be called upon to surrender the goods, or the value of them, to their real owner (*l*); and a person, though he comes into possession of goods properly, nevertheless does not always take or retain the right to dispose of them; thus, if a person is entrusted with jewels in a bag sealed, to be kept safely for the use of the real owner, he becomes possessor *malâ fide* by breaking the seals; he has no right to the property, and he cannot transfer to the banker more right than he has himself.

Thus, where one of two partners in an adventure pledged a bill of lading of goods consigned to him by the other partner for the purposes of the adventure, with his bankers, as a security for advances made by them to him, they knowing that the goods were partnership property, and that the proceeds were not to be applied for partnership purposes, they obtained no right to the goods (*m*).

Deposit of Securities against Advances.—Having observed what is the effect of depositing securities with a banker for safe custody, or for some specific purpose, not giving any property in them to the bankers, in cases which, for the most part, have arisen, where the customer's account with the bankers has been in his favour, let us proceed to investigate the effect of depositing securities when the balance is against him, and when the object of the deposit is to save harmless the bankers against their advances to the customer.

The following case may, perhaps, be fitly selected for leading notice, as being a transaction between two banks, and as containing an important principle for ascertaining when such securities are to be held to be in the order and disposition of bankers, in the event of their bankruptcy.

(*l*) *Hartop v. Hoare*, 3 Atk. 44.

(*m*) *Snaith v. Burridge*, 4 Taunt. 684.

Policies of Assurance.—A., being a banker at Manchester, had become mortgagee of certain policies of life assurance, the various insurance offices interested having notice of the fact. He applies to B., a banker at Wirksworth, for a loan of money, offering to deposit them and other securities. This was agreed to, and the deposit was made, but no notice is given to any of the several insurance offices interested. In such case these securities, notwithstanding they were in fact handed over to B., remain, on the bankruptcy of A., in the order and disposition of A.; the title to them does not pass to B., no notice having been given to the insurance offices of the transfer, and A. continuing to pay the premiums on the policies for six months after that transfer, so as to hold himself out as owner (which was part of the circumstances).

The general principle involved is now well established, viz., when a debt, due to a trader, is assigned by him, it remains, notwithstanding such assignment, in his order and disposition, in the event of bankruptcy, if nothing more is done to give publicity to the assignment, than the mere delivery of the instrument creating the debt. This principle applies equally to a policy of assurance (*n*).

With respect to the question, to whom shall notice be given? The general rule is this—No notice of the assignment of a debt can be necessary to any party, from whom the trader is not to receive payment, or who does not hold any property in the order or disposition of the trader (*o*).

It does not appear to be intended to make any distinction as to the matter of a notice of an assignment, between persons acting for themselves, and persons acting as executors and trustees: if, as has been stated authoritatively (*p*), the reason why notice to one trustee has been held sufficient, is because nothing less than inquiry of all the trustees would satisfy a prudent inquirer; that reason

(*n*) *Ex parte Arkwright*, 3 M. D. & De G. 143, 194; *Belcher v. Bellamy*, 2 Exch. 303; 17 L. J. Exch. 219.

(*o*) *Gardner v. Lachlan*, 4 M. & C. 132, *per* Lord Cottenham, C.

(*p*) *Per* Wigram, V. C., 1 Hare, 96, 97.

seems to apply equally, or, perhaps, it is more accurate to say, it applies much more strongly, in the case of executors, where each may give acquittances, and pay and receive, on account of the estate, and where, although it is often found that one only takes an active part, yet there is nothing to prevent any of the others, at any time, effectually interfering in the management of the estate.

In the above-mentioned Manchester case (as it has been in other cases), it was contended, in respect of one of the policies deposited, that being made in the Equitable Assurance Office—a company, which is a mutual assurance company, where each person insuring is a shareholder and member of the company, and therefore a partner, a formal notice of deposit was not necessary in such case, because notice to one partner was notice to all the company; but the Vice-Chancellor nevertheless held himself bound, under all the circumstances of the case as stated, to make no distinction between the policy in this company and the others (*q*).

It is to be remembered, however, that on a deposit of a policy of assurance, by way of equitable mortgage, the *onus* does not lie on the mortgagee to show that notice of the deposit was given to the office before the bankruptcy, but with the assignees to show that it was not (*r*); and where a bankrupt, being one of the directors of a life assurance office, deposited a policy, made in that office, with his bankers, one of the bankers being also one of the auditors of the assurance office, it was considered that, in these facts, there was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the assignees claiming the policy, as being in the reputed ownership of the bankrupt at the time of the bankruptcy (*s*). This decision, however, has been disapproved

(*q*) *Ex parte Arkwright*, 3 M. D. & De G. 143.

(*r*) *Ex parte Stevens*, 4 Deac. & Ch. 117; *Edwards v. Scott*, 1 M. & G. 962; *Tibbits v. George*, 5 A. & E. 107.

(*s*) *Ex parte Waithman*, 4 Deac. & Ch. 412; *Ex parte Watkins*, 2 M. & A. 348.

by Sir E. Sugden, C. (t), and would hardly be followed at the present day.

When a mortgagee of a policy of life assurance deposits it with his bankers by way of sub-mortgage, and gives notice of the sub-mortgage to the insurance office, it is not necessary that he should give notice also to the original mortgagor, in order to take the security out of the principle of reputed ownership, on the bankruptcy of the depositor (u).

If a trader deposits a policy of assurance with his bankers to secure a floating balance, signs a memorandum of the object of the deposit, and notice is given of it to the insurance office, and afterwards he takes a partner and opens a fresh account with the bank in the name of the firm, and the policy remains in the bank, and is treated as a security for the floating balance due from the firm, but of this change in the object of the security no memorandum is signed, nor any notice given to the office, the policy is nevertheless not in the order and disposition of the depositor on his subsequent bankruptcy, because the prior notice, rendering it impossible to deal with the policy, without making inquiries, effectually prevents that result (v).

A life policy is deposited by a bankrupt before an act of bankruptcy, notice of the deposit not being given till after such act, and not till seven years after the deposit (but before *fiat*), but it not appearing that the depositee knew of such act, the notice was held sufficient to give the depositee a good title, as against the assignees, inasmuch as

(t) *Ex parte Hennessey*, 1 Connor & L. 562. Generally knowledge is sufficient notice, *Tibbits v. George*, 5 A. & E. 107; *Smith v. Smith*, 2 C. & M. 231.

(u) *Ex parte Barnett*, 1 De Gex, 194. At law it has been ruled that assignees of a bankrupt cannot recover in trover a policy of insurance effected by the bankrupt, and deposited as above, although no notice had been given to the office; *Gibson v. Overbury*, 7 M. & W. 555; but the Court fully admitted the authority of the cases cited above on this subject, as regards the doctrine of notice; and held that the assignees might recover the debt due upon the policy from the office. *S. P.*, *Belcher v. Campbell*, 8 Q. B. 12.

(v) *In re Styant*, 2 M. D. & De G. 219; 1 Ph. 105.

the whole was *bonâ fide*, and the transaction was fully completed before the *fiat* (x).

The notice of a deposit, given to an insurance company, needs not be in writing (y).

Where no bankruptcy intervenes, the necessity does not arise, of a notice of the transfer or assignment being given to the office, but the mere deposit of the policy, it being the intention, at the time, to give the bankers a lien, will suffice to constitute them equitable mortgagees, although there is no memorandum of deposit, and even although there is a memorandum of deposit relating to other policies of assurance, and deposited at the time, but not comprising the policy in question (z).

As regards the proper person to give notice of transfer to, in order to bind an insurance company, the following may be laid down.

All risks as to whether notice has been properly given to the insurance company will be avoided, in all probability, by acting on the suggested rule (a), *to give notice to the officer representing the company*, which, in the case of an incorporated company, would be the head or chairman, or the directors, or the secretary, according to the terms of the charter, or incorporating statute; in the case of a joint-stock company, would be the public officer of the company, or secretary, or agent of the company, according to the terms of the deed of settlement, and to the usual practice of the company.

In a case where it was proved that the company had authorized their agents to receive notices of assignments of policies, and agreed that notices to their agents should be as valid as if served on the company: it was held, that knowledge of an assignment obtained by one of their

(x) *In re Styant*, 2 M. D. & De G. 219; 1 Ph. 105.

(y) *In re Raikes*, 4 Deac. & C. 412; *Ferris v. Mullins*, 2 De G. & Sm. 386.

(z) See *Ferris v. Mullins*, 2 De G. & Sm. 378.

(a) *Per* Sir E. Sugden, C., *Ex parte Henessey*, 1 Connor & L. 563; 2 Dru. & War. 555.

agents, not in the shape of a communication to the company, but as the attorney for the assignor and assignee, was sufficient (*b*). Where notice is necessary, it makes no difference that the particular company has a rule dispensing with such notice (*c*).

It is very material for bankers to ascertain, that the deposit of a policy of assurance is made in all respects in a proper and unobjectionable manner; if it is not, the deposit may be ineffectual, as a security; at least, without an application to the Court of Chancery.

Thus, a certain banking house advanced to A. 250*l.*, on two promissory notes, and the security of a policy on his own life for 1,000*l.*, which he deposits with them. Now, this policy had already been assigned by deed to a third person, B., who had negligently left the instrument in the hands of A. Then B. died, and his executor paid the premiums, as B. had been in the habit of doing, up to the death of A., when the executor brought detinue against the bankers for the policy, and recovered; the bankers not being able to make out their allegation, that B. had fraudulently intended to leave in the hands of A. the policy, in order that A. might have the means of borrowing money of some one, and to cheat some one by so doing (*d*). Notice of the assignment had been duly given to the insurance office, but it seems that, in the usual course of business, the insurance office would have refused to answer any inquiries that the bankers might have made on this point.

One of the conditions of a life policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties for valuable consideration six months before his death, and the assured had, by a letter to his bankers, charged it with a floating balance due to them, and made three years previously to his committing suicide: it was held, that the charge was

(*b*) *Gale v. Lewis*, 9 Q. B. 730; see *Wing v. Harvey*, 18 Jur. 394; 23 L. J., Chanc. 511; 5 De G., Mac. & G. 252.

(*c*) *Ex parte Patch*, 7 Jur. 820; 12 L. J., Bank. 44.

(*d*) *Neale v. Molineux*, 2 Car. & K. 672.

within the exception, and the bankers entitled to recover what was due (*e*).

In the case of an assignment of a policy of assurance it is not essential that the assignment should contain a declaration that the receipts of the bankers shall be sufficient discharges to the insurance company; for, that they will be so is necessarily implied from the nature of the transaction (*f*). On the other hand, in the case of a mere equitable mortgage by deposit of the policy, although the assignees of a bankrupt depositor cannot recover back the policy from the bankers by means of an action at law, yet, if the assignees have claimed the debt due on the policy, in time, they may, on its being paid to them, give a valid discharge to the company (*g*); and thus the bankers would be left without remedy, and so would find their security worthless.

Assignment of Shares in Companies.—A customer, by indenture, assigned to his bankers shares in a company standing in his name in the books of the company, subject to redemption on payment of a sum therein mentioned, and with a power of sale and a covenant for further assurance. The bankers gave the usual notice to the company of this indenture and the transfer; an entry thereof was made in the company's ledger, the indenture of assignment having been prepared in the office of a firm, who were the company's solicitors. The company afterwards refused to recognize this transfer, because it had not been made with the formalities required by the deed of settlement of the company, of which the assignor was a director, and they never removed the name of the assignor from their books, in which these shares still stood, in his name, when he became bankrupt. It was held, that the notice was sufficient, and that the circumstances sufficiently

(*e*) *Jones v. Consolidated Investment and Insurance Company*, 26 Beav. 256; 28 L. J., Chanc. 66.

(*f*) *Per Lord Cranworth, C., Dessborough v. Harris*, 5 De G., Mac. & G. 439.

(*g*) *Gibson v. Overbury*, 7 M. & W. 562.

showed the bankrupt not to be the reputed owner of the shares, at the time of the bankruptcy (*h*).

So, where a director of an insurance company executed an assignment of his shares, as a security, to a person who gave notice to the insurance company, though not until some time after the assignment: it was held, that the notice having been given before the act of bankruptcy, the shares were not in the order and disposition of the bankrupt, within the 12 & 13 Vict. c. 106, s. 125, and that the assignee of them had a good equitable mortgage (*i*).

The obvious mode to avoid all question is, for the bankers, in all cases of deposits of policies or of shares, to take care to give notice immediately, and to see, in the latter case, in addition, that the proper transfer is completed, according to the terms of the statute or deed of settlement under which the company is constituted.

Shares in a banking company were, by the deed of settlement, to be subject to a lien on behalf of the company when the proprietor of them became debtor to the company; in such case (the proviso being indorsed on the certificates of the shares), the shares are not in the order and disposition of the proprietor at the time of his bankruptcy (*k*).

The result of the above statements, which have been made with a view of placing before the reader the application of the rules governing deposits of securities, and chiefly of policies of assurance, to varied combinations of facts, is to show the great importance to bankers of providing that every transaction of this kind is fully completed, both in other respects and by giving notice to the insurers and others, so as to take the securities out of the order and disposition clause, on bankruptcy. For, although where the policy has been actually handed over, and is in the hands of the bankers, as a security for the repayment of a previously-existing debt, the assignees cannot recover the

(*h*) *Ex parte Masterman*, 2 M. & A. 209.

(*i*) *Ex parte Littledale*, 24 L. J., Bank. 9; 6 De G., Mac. & G. 74.

(*k*) *Ex parte Plant*, 4 Deac. & C. 164.

document in trover, and the bankers' lien upon it is said to remain, although no notice has been given of the deposit to the insurers, yet practically such lien, it would seem, must be of little value; for the assignees may, notwithstanding, give a discharge to the office for the debts due upon the policy to which the bankrupt was entitled (*l*).

Certificates of Shares.—As to the effect of depositing certificates of shares of railway or other companies with bankers, by way of security for advances.

A. and B. were partners in business as sharebrokers, and were also in the habit of buying and selling shares in partnership. They dissolved partnership on the 11th of October, 1844, of which their bankers, with whom they opened an account on the 14th of August, 1844, had notice. A., who was the partner that attended to this portion of the business, had, previously to the dissolution, contracted to purchase a number of scrip shares in various railways, on account of the firm. After the dissolution he deposited some scrip certificates of these shares with the bank. They had not been paid for at that time, and he obtained from the bank an advance of money, on the security of them, for the purpose of paying the purchase-money, and he signed an authority to the bank, in the name of the firm, empowering them to sell the shares if the money was not advanced within a certain time. B. then instituted a suit in Chancery against A. and the bankers, praying a declaration that B. was not bound or affected by the deposit of the shares on account of the firm, or by any of the dealings and transactions which took place with the bank, after the dissolution of the partnership.

The Court, however, held, that, looking to the nature of the trade, which was that of buying and selling, that the

(*l*) *Gibson v. Overbury*, 7 M. & W. 561, 562.

shares were not like land or property, to be retained and used by the firm ; that the debt, in respect of the shares, was, from its nature, one which must be immediately due ; that A. was authorized by B. to purchase the shares ; that his only alternative was to complete the purchase by paying for the shares, or to resell ; he had authority, notwithstanding the dissolution, to do the former by raising money as he did, and to empower the bankers to sell, in default of repayment (*m*).

A customer, in a case where the Liverpool Albion Bank were the bankers, to secure an advance made to him, deposits certificates of shares in a railway company (which shares, by the provisions of the railway act, could only be transferred by an instrument of a prescribed form), together with all instruments of transfer in the prescribed form, except that the blank for the transferee's name was left unfilled. The bank gave notice of their lien to the secretary of the railway company. It was held, although the private act constituting the company expressly excluded persons claiming by any other title than the mode pointed out in the statute (which had not been in all respects complied with here) from any part or share in the profits of the undertaking, that the bank had a lien on the shares, and that, having paid certain calls in respect of them, they were entitled to add these sums to the amount already advanced, and that their lien extended as a security for the whole amount (*n*).

Where there is a deposit of railway share certificates by the owner, with a memorandum declaring them to have been deposited as an equitable mortgage, and that the owner charged them with the debt, &c., no notice to the company is necessary to perfect the security of the bank ; because notice is only necessary when a charge is to be created by way of equitable mortgage or an equitable in-

(*m*) *Butchart v. Dresser*, 10 Hare, 453 ; affirmed on appeal, 4 De G., Mac. & G. 542.

(*n*) *Ex parte Dobson*, 2 M. D. & De G. 685.

terest, and where there are trustees in whom the legal estate is vested (o).

Dock Warrants and Bills of Lading.—A deposit of dock warrants, duly indorsed, is a good security; for the property in the goods passes by the delivery of the warrants, which empower the holder to obtain actual possession of the goods (p). So bills of lading, expressed to be made out to the order of the shipper or his assigns, transfer the ownership, so as to enable them to take possession; but not at common law so as to bring an action (q).

Now, however, by the 18 & 19 Vict. c. 111, s. 1, every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass by reason of such indorsement, shall have transferred to and vested in him all rights of suits, as if the contract in the bill of lading had been made with himself.

Securities for Specific Balances.—A deposit, expressly made as a security for a specific portion only of a general balance, precludes the admissibility of any inference that it was intended as a security for the whole of the general balance (r).

Discharge on Joint Advances.—When securities are assigned to A. and B., bankers, for monies to be advanced by them, or either of them, and A. survives B., it has been decided, that as the securities were made to the two jointly, A. could give a sufficient discharge for the whole amount due on the securities (s).

Title Deeds.—With respect to the deposit of title deeds, it is desirable to state the principal results of the decisions, many of which tend to show that bankers have acted at

(o) *Watts v. Porter*, 3 El. & Bl. 743; 23 L. J., Q. B. 350.

(p) *Lucas v. Dorrien*, 1 Moore, 29; 7 Taunt. 278.

(q) *Thompson v. Dominy*, 14 M. & W. 403.

(r) *Vanderzee v. Willes*, 3 Bro. C. C. 21; *In re Medewe*, 26 Beav. 588.

(s) *Brasier v. Hudson*, 9 Sim. 1.

times, in such cases, as though they were *inopes consilii*, and have suffered accordingly.

Two traders, in partnership, having had for many years an account with a bank, deposited with them certain title deeds of an estate belonging to one of the partners separately, as a security for the balance which might be due to the bank from the firm, from time to time, upon the account current. No written memorandum was at that time made of the object of the deposit; but afterwards, upon a further advance by the bank, the owner of the title deeds signed a letter or memorandum stating the deposit to be for securing that as well as future advances. The banking firm had some changes made in its members after the deposit was made, and, in point of fact, all the advances made by the banking firm with whom the deposit was made had been paid off by the traders; but fresh advances were made by the new banking firm, who continued to hold the deeds: it was, nevertheless, held that the security was a continuing security, and that the banking firm was equitable mortgagee of the estate to the amount of their advances (*t*).

As between the bank and the general creditors of a bankrupt, who has deposited title deeds with them before bankruptcy, the bank has the priority and the best title; although the deeds deposited were old deeds, not including the conveyance from the depositor's vendor, but the intention of the deposit undoubtedly being to create a lien; that is, the bank are equitable mortgagees against the general creditors (*u*).

It is not necessary, for the purpose of effecting an equitable mortgage, that *all* the title deeds relating to the estate should be deposited, provided real and material portions of them be deposited (*v*).

It is to be observed that the deposit must be made at

(*t*) *Ex parte Smith*, 2 M. D. & De G. 314.

(*u*) *Ex parte Lacon*, 1 Bank. & Ins. 107.

(*v*) *Lacon v. Allen*, 26 L. J., Chanc. 18.

such a time and under such circumstances as to be free from suspicion, otherwise the bank will not be allowed the advantage of the character of equitable mortgagee; and there must be an actual deposit to constitute an equitable mortgagee; an order on a third party to deposit a lease when executed is not sufficient (*x*). Also, the deposit ought always to be accompanied by a written memorandum of the object and purpose for which it is made.

In general, however, assignees of a bankrupt are entitled to apply to the Court for directions, in cases of equitable mortgages, and, therefore, even in a clear case, where the assignees are requested by the bankers, who hold an equitable mortgage, to consent to a sale of the property without putting the bankers to the expense of petitioning, the assignees will have the costs of the proceeding out of the mortgaged estate (*y*). And it has lately been intimated by the Court of Appeal in Chancery that the previous practice as to costs, namely, that an equitable mortgagee, by a mere deposit, paid the costs of the petition, but that a memorandum entitled him to his costs out of the proceeds of the sale of the mortgage was incorrect; and in the case before the Court, which was an appeal by an equitable mortgagee from a decision of a commissioner, which the Court reversed, they ordered the petitioners' costs of appeal to be paid out of the estate, and all other costs to be added to their security (*z*).

The prudence and propriety, with a view of preventing disputes and removing all ground for question and litigation, have been pointed out, of always taking a memorandum of the object and purpose for which the deposit was made, and numerous instances have occurred in which much delay in realizing the securities would have been saved to bankers if their advisers had been duly alive to these

(*x*) *Ex parte Perry*, 3 M. D. & De G. 252.

(*y*) *Ex parte Stevens*, 3 M. D. & De G. 317. As to the form of an order in the case of bankers being equitable sub-mortgagees, see *Ex parte Powell*, 1 De Gex, 405; *Ex parte Burdiss*, 1 De Gex, 406, n.

(*z*) *Ex parte Barclay*, 5 De G., Mac. & G. 417.

considerations ; and although it has lately been held, as already pointed out, that the former practice, which made a difference between the costs of the usual order for sale, &c., when there was a memorandum of deposit and when there was none, is no longer to be observed, yet that alteration does not weaken the force of the above considerations, or make it prudent to neglect to take the course recommended on these grounds. For it has been laid down, that in doubtful cases, where there is no memorandum, the Court leans against considering the deposit as securing antecedent debts (*a*). At the same time, it is not meant to suggest that a deposit, without a written memorandum, is invalid ; that notion is inconsistent with the doctrine of the Courts ; for it is held that a written memorandum of deposit is not essential, and that there may be a valid deposit in equity without a word, at least, when the possession of the securities cannot be accounted for in any other way, the holder being a stranger to the title and to the deeds (*b*). What is indispensably necessary is, that the bankers should have actual possession of the securities. An instance will show this more clearly than mere assertion can do.

A memorandum of deposit of securities is handed to a banker, stating that a policy of assurance on the life of the depositor had been deposited with the banker ; but, in fact, the deposit is never actually made, and the policy remains in the hands of the depositor, and is found in his chest at the time of his bankruptcy. What, then, is the result ? The transaction is wholly illusory as regards the bankers ; for the Court held that the property in the policy passed to the assignees of the bankrupt, and, consequently, the only resource for the bankers would be to come in among the general creditors and prove their debt (*c*).

On the other hand, an agreement to give a mortgage,

(*a*) *Ex parte Martin*, 4 Deac. & C. 457.

(*b*) *Bozon v. Williams*, 3 Y. & J. 150.

(*c*) *Ex parte Halifax*, 2 M. D. & De G. 544.

and the delivery of title deeds for the purpose of having the agreement carried into effect, constitute an equitable mortgage (*d*); at least, this seems to be the better opinion (*e*); but the mere casual possession of title deeds (*f*) does not.

When title deeds are deposited by way of equitable mortgage, and a memorandum merely states the purpose for which they are deposited, it is not an agreement for a mortgage, and does not require to be stamped (*g*).

A trader deposits certain leases of premises, accompanying the deposit with a memorandum, stating that the depositors were to be equitable mortgagees of the leases and premises, and fixtures and appurtenances, as security for a debt. The trader continues in possession of the premises comprised within the memorandum, and becomes bankrupt.

The depositors petition in bankruptcy for the realization of their security. The leases and trade and other fixtures and fittings up are sold under an order. The Lord Chancellor decided that the depositors were entitled to the proceeds of the whole, without excepting the trade fixtures, which he held not to be in the order and disposition of the trader, so as to pass to the assignees within 12 & 13 Vict. c. 106, s. 125, and the costs of the petition were ordered to be added to the security of the depositors (*h*).

A person deposits with his bankers the title deeds relating to certain steam-mills, cottages, land, buildings and machinery of which he was possessed, for an estate in fee simple. The original memorandum of deposit was not forthcoming, but a draft of it was proved, and it purported to be made for securing to the bank all monies then owing to them by the depositor, and which should in future be advanced to him by them, together with bankers' com-

(*d*) *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Y. & C. 55.

(*e*) *Ex parte Bulteel*, 2 Cox, 243; *Bulfin v. Dunne*, 12 Ir. Chanc. Rep. 67.

(*f*) *Lucas v. Dorrien*, 1 Moore, 29; *Russel v. Russel*, 1 Bro. C. C. 269.

(*g*) *Meek v. Bayliss*, 31 L. J., Chanc. 448.

(*h*) *Ex parte Gawan*, 25 L. J., Bank. 1; 5 De G., Mac. & G. 403.

mission, and all other usual charges, and also all balances which should at any time be due from the depositor on his banking account, together with interest for the same after the rate of 5*l.* per cent. per annum. After the date of the deposit the depositor erected buildings for crushing bones, and also for crushing oil seeds, with the necessary machinery and steam-engine, all affixed to the freehold. This was held to be an equitable mortgage, giving a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removable as between landlord and tenant (*i*).

A similar deposit of a lease would operate as an equitable mortgage of all fixtures, although erected for the purposes of trade, and therefore removable as between landlord and tenant; and although the fixtures are not specified in the lease, or in the memorandum of deposit (*k*).

In cases of equitable mortgages by manufacturers, questions sometimes arise as to the passing, under the deed, of the machinery, &c. The following case exemplifies the principle that has been adopted for the decision of such questions.

A customer of a bank, being *owner* as well as occupier of a freehold cotton mill, executed to the banker a mortgage in this form, viz., the customer, by indenture, “demised and assigned unto the banker certain plots of land, factories, mills, warehouses, erections and buildings, together with the steam-engines, and also all and singular other the moveable and fixed machinery and steam pipes then in, upon, about and belonging to the said steam-mills and premises, or occupied or used therewith, to hold to the banker for 900 years, for securing the repayment of the monies then owing from the customer to the banker, or thereafter to become due, not exceeding in the whole

(*i*) *Ex parte Price*, 2 M. D. & De G. 518; *Ex parte Lloyd*, 3 Deac. & C. 765.

(*k*) *Ex parte Broadwood*, 1 M. D. & De G. 631; *Ex parte Cowell*, 17 L. J., Bank. 16; *Ex parte Bentley*, 2 M. D. & De G. 591.

5,000*l.*, with interest at 5*l.* per cent.;" with a power to the banker to sell and dispose of the premises, for better realizing and securing the said principal monies and interest.

The mortgagor continued in possession of the mill, &c., up to the time of his bankruptcy. In this case, not being one in which a tenant had put up the machinery, &c., but the case of an owner who had himself erected all the works, it was considered that all such parts of the machinery as were legally attached to the freehold passed with the freehold to the mortgagee, and were not goods and chattels belonging to the assignees of the bankrupt (*l*).

An equitable mortgagee, by deposit, is not in general, as such, entitled to demand a legal mortgage to be made to him (*m*), unless there is a contract that one shall be made; in that case, the bankers will be considered, in equity, to be purchasers for good consideration within 27 Eliz. c. 4, in respect of the balance due to them, against a prior voluntary settlement (*n*). Nevertheless, at law, the trustees of the settlement may recover the deeds in trover from the bankers (*o*).

A deposit of title deeds *prima facie* creates an equitable mortgage upon the whole property comprised in them; and further, where the memorandum of deposit stated it to have been made with the object that the deeds should remain in the possession of the depositor till such time as the depositor's account, due to the depositor, did not exceed the sum of 100*l.*, at which time they were to be restored to the depositor, free of expense, and the depositor died indebted to the depositor in 274*l.*, it was decided that the lien extended to the whole 274*l.* (*p*).

An equitable mortgagee, by deposit of a lease, is not

(*l*) *Ex parte Wilson*, 4 Deac. & C. 143.

(*m*) *Parker v. Housefield*, 2 M. & K. 419; *Metcalf v. Archbishop of York*, 1 M. & C. 557.

(*n*) *Lister v. Turner*, 5 Hare, 281.

(*o*) *Kerrison v. Dorrien*, 9 Bing. 76.

(*p*) *Ashton v. Dalton*, 2 Collyer, 565.

bound, *at the suit of the lessor*, to take a legal assignment of the lease, nor is he liable to the covenants of the lease (*q*); for there is no privity between him and the lessor until he has made himself legal assignee; and so to hold "would effectually prevent anybody from ever taking a deposit of a lease as a security for a sum of money; for no man in his senses would take a deposit of a lease if he were thereby to render himself liable to the covenants of the lease" (*q*).

What an equitable mortgagee is entitled to at the hands of the Court is either a foreclosure or a sale, at his option (*r*); but, in general, the mortgagor may have allowed him six months' time in which to redeem the deposited deeds (*s*).

If the banker, having such equitable mortgage by deposit of the title deeds of an estate in fee, enter into receipt of the rents of the mortgaged estate, such receipt amounts to a payment, *primâ facie*, either of the principal or interest of the debt, as the case may be, so as to take the case out of the Statute of Limitations; and, therefore, where the mortgagor was dead, it was considered, in such a case, that the bankers had probably a right to have the estate sold, the proceeds to be applied in payment of the debt, and to come in, as general creditors, for the balance (*t*).

It is to be borne in mind, however, that if a banker, being equitable mortgagee of land, takes upon him to assume the right of taking possession, without applying to a court of equity for leave or directions to do so, and unreasonably and unnecessarily, for the purpose of defending any right given him by his mortgage, defends an action brought against him in consequence of his so acting, and is unsuccessful in his defence, he will not be allowed the

(*q*) *Moore v. Greg*, 2 Ph. 717; *Cox v. Bishop*, 26 L. J., Chanc. 389.

(*r*) *Perry v. Keane*, 6 L. J. (N. S.) Chanc. 67.

(*s*) *Parker v. Housefield*, 2 M. & K. 419; *Thorpe v. Gartside*, 2 Y. & C. 730; *Miller v. Woods*, 1 Keen, 16; 15 & 16 Vict. c. 86, s. 48.

(*t*) *Brocklehurst v. Jessop*, 7 Sim. 438.

costs out of the mortgaged estate (*u*). In general, an equitable mortgagee is not entitled to the rents and profits prior to the date of the order of sale (*x*).

In reference to questions respecting a freehold or leasehold security, it may be well to point out, that the deposit of the lease of a house, or deeds of conveyance of a house and furniture to the depositor, does not, by any means, necessarily extend to charge the furniture in the house.

Thus, where A. deposits with B., as security for a debt, certain deeds of lease and release, by which a freehold house at Bognor, and the furniture therein, were conveyed and assigned to A., and the memorandum of deposit was "Herewith I hand you the title deeds of my Bognor estate, to be held by you, &c.;" these words were decided not to extend to the furniture, which, under them, did not pass to B., nor did any interest in the furniture. If it had been the intention that the furniture should be included in the security, B. ought to have taken care that A. so expressed his memorandum of deposit as to include the furniture, and that a schedule was added enumerating the different articles (*y*).

It seems, however, that, when a lease of a house is deposited, on the sale of the lease and goodwill of a business, established in it, the deposittee is entitled to the whole of the price, whether it be considered to arise from the goodwill, or from the value of the lease, independently of the goodwill (*z*).

A parol agreement, that, when a lease shall be granted, it shall be deposited as a security for a sum advanced, does not constitute an equitable mortgage (*a*), though an agreement to mortgage real estate, followed up by a subsequent deposit of the title deeds of the estate, will amount

(*u*) *Dryden v. Frost*, 3 M. & C. 670.

(*x*) *Ex parte Alexander*, 2 Glyn & J. 275; *Ex parte Bignold*, 4 Deac. & C. 259.

(*y*) *Ex parte Hunt*, 1 M. D. & De G. 139.

(*z*) *Chisum v. Dewes*, 5 Russ. 29.

(*a*) *Ex parte Coombe*, 4 Madd. 249.

in equity to a mortgage, and will be effectual from the date of the agreement (b).

If a mortgagee, for a term of 500 years, deposits with a banker the mortgage deed, as security for 800*l.*, and interest, and afterwards purchases of the mortgagor the equity of redemption, there being no memorandum of deposit, and afterwards becomes bankrupt, the whole of the bankrupt's interest in the property must be sold, and the assignees must join in the conveyance to the purchaser (c).

When the deposited documents are title deeds, which have been deposited with the customer by a third party, with a written memorandum of the object of their deposit with him, it is not necessary, to constitute a valid and equitable sub-mortgage to a banker, that the original memorandum should also be deposited (d).

A memorandum, in writing, of deposit, which states the deposit to be for the purpose of securing any sum or sums of money which *may* be advanced by the banker, does not necessarily prevent the security from applying to past advances (e), and if a specific sum be mentioned in it, the amount may be increased by a subsequent verbal agreement (f).

It is now settled that if bankers take a mortgage to secure a specific sum and future advances, and the mortgagor makes a second mortgage to A. in a similar form with notice of the prior mortgage, they will not be entitled to priority for further advances made after notice of the mortgage to A. (g).

A banking house, in consideration of an existing debt, and of a further advance of money to a customer, obtained from him a deposit of all the title deeds of certain freehold

(b) *Edge v. Worthington*, 1 Cox, 211.

(c) *Ex parte Tufnell*, 4 Deac. & C. 29.

(d) *Ex parte Smith*, 2 M. D. & De G. 587.

(e) *Ibid.*

(f) *Ex parte Nettleship*, 2 M. D. & De G. 124; *Ex parte Langston*, 1 Rose, 26. The same does not hold of a *legal* mortgage. *Ex parte Hooper*, 2 Rose, 328.

(g) *Hopkinson v. Rolt*, 7 Jur., N. S. 1209 ; 28 L. J., Chanc. 41.

and copyhold lands of which he was seised, with a written memorandum signed by him, regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgment against him, and, under 1 & 2 Vict. c. 110, s. 13, sued out *elegits*, under which the sheriff delivered to them the whole of the land. The bankers, having filed a bill in chancery, praying that they might be declared to have an equitable mortgage upon the land, and to be entitled to priority over the *elegits* and judgments, had their prayer granted, *there having been no laches on their part*, and their title being perfected before the judgments were recovered (*h*).

The bankers, it may be observed, having perfected their title as equitable mortgagees, must have been preferred to the judgment creditors in this case, independently of the statute (*h*).

Indeed, such perfected equitable mortgage will prevail, even against an extent at the suit of the Crown (*i*), except where the mortgagor is an accountant to the Crown (*k*).

But where bankers took a mortgage from a customer as security for an existing debt and any further advances which they might make to him up to 20,000*l.*, and, after the date of this mortgage, the customer executed another mortgage to A. of the same property, to secure the debt then due to A., and also to secure all future advances, A. having notice and full knowledge of the former transaction; and the bank, also having notice of this transaction, subsequently advanced 8,000*l.* to the customer, requiring the concurrence of A. to sanction it, and taking as additional securities certain orders for the payment of instalments due from a railway company. A.'s sanction, however, was not obtained, and the bank made the advance without it. The Court considered A. to be entitled in respect of his mort-

(*h*) *Whitworth v. Gaugain*, 3 Hare, 416; affirmed, 1 Ph. 728, and adopted, *Watts v. Porter*, 3 El. & Bl. 743.

(*i*) *Casbard v. Att.-Gen.*, 6 Price, 411; confirmed, *Watts v. Porter*, 3 El. & Bl. 743, 753.

(*k*) *Broughton v. Davies*, 1 Price, 216.

gage to priority over the bank, as far as concerned their advances made subsequently to their knowledge of the mortgage to him (*l*).

A deed of conveyance of the legal estate in fee in the impropriate tithes of Kilcolman was deposited by way of equitable mortgage with a bank, in consideration of an advance of money, by a person who was heir-at-law and administrator, with the will annexed, to the grantee of the conveyance, who was deceased, and who devised all his right, title, and interest, in the tithes of Kilcolman, (he being, at the time of making his will, only equitable mortgagee of the same,) to A. B. The administrator made the deposit without the knowledge of A. B., who, from the time of the death, had been in possession of the tithes, and had frequently applied to the administrator for the deed, but could not obtain it. The bank, two years later, filed a bill against the administrator for a sale, and a final decree for sale was pronounced.

Under such circumstances, the bankers, being purchasers for valuable consideration, without notice of the will of the testator, or of the title of any person claiming under it, will be protected in equity; and it makes no difference, that the person really entitled to the tithes may have trover for the deeds in a Court of Law, and must succeed *there*. Hence, they can make no practical use of the deeds; and they cannot retain possession of them against the true owner of the tithes, who, as such, is entitled to the deeds; but, in equity, they have the right to say, that they ought not to be compelled to deliver them up, as they obtained them *bonâ fide*, and without notice (*m*).

Where bankers take a mortgage as security, the principal point to be considered is, that the lands, &c., meant to be charged, shall be precisely specified or designated. It is true that the intent to give a general charge upon all the property of the mortgagor may be explained *aliunde*,

(*l*) *Rolt v. Hopkinson*, 4 Jur., N. S. 919, 1119; 28 L. J., Chanc. 41.

(*m*) *Joyce v. De Moleyns*, 2 J. & L. 374.

but the shortest, the safest, and the least troublesome and expensive mode of effecting an arrangement of this kind is, to have care taken that the mortgage deed is made as complete as possible within itself, so as to require no subsequent propping up. The following case seems to be in point to show this.

Articles of agreement under seal were entered into by a banker in the country, in order to secure a bank in London, the correspondents of the former, for advances with the latter, reciting that the country banker had agreed to give the latter a mortgage on his *freehold* estates at Iver, subject to the charge affecting the same, and the country banker agreed to execute a mortgage of *all his estate and interest* in the lands, tenements, and hereditaments, at or near Iver. Part of the property at Iver was mortgaged to a third person, and a part also was copyhold. It was held, that, notwithstanding the recital, the security extended to the property at Iver which was not subject to any previous charge, and also to the copyholds; and, also, that the intention to give a general charge on all the property might be explained by other written *memoranda* of agreement; and the London bankers were declared to be equitable mortgagees until the amount due, in respect of their security, should be realized (n).

Deeds relating to a trust estate were deposited for safe custody at a bankers', in a tin box marked "New's Trust." One of the *cestuis que trustent* afterwards opens an account with the bank, and, on its appearing that his account was overdrawn, makes a parol agreement with the bankers that they might hold the deeds, so far as they related to his interest in the estate, as a security for his current account. Afterwards, a deed of partition being executed between the customer and the other persons interested with him in the estate, he signs a memorandum, stating that he has

(n) *Ex parte Glyn*, 1 M. D. & De G. 29. An equitable mortgage may be made by deposit of copy of Court roll. *Lewis v. John*, 9 Sim. 366; *Whitbread v. Jordan*, 1 Y. & C. 303; *Tyler v. Webb*, 6 Beav. 552.

deposited the deeds therein described, "as a collateral security for any advances you may make on my behalf." The deeds described in the memorandum were those already in the possession of the bank ; the deed of partition was not deposited ; but the whole circumstances showing that the intention was to secure the bankers against past as well as future advances, to be gathered from various conversations held by the customer with one of the partners, and with one of the clerks of the firm ; it was decided that such was the effect of the deposit, and that the bankers were equitable mortgagees of the estates held in severalty by the customer, and that the security extended to advances made as well before as after the date of the memorandum (o).

Exchequer Bills.—Where A. deposited an exchequer bill (with the payee's name in blank) with B., in order that he might sell it, but B., instead of doing so, places it in the hands of his bankers, who advance him money to the amount of its value ; B. having become bankrupt, it was held, by the majority of the Court of King's Bench, that A. had no right of action against the bankers to recover the bill, because the property in exchequer bills passes by delivery (p). It will be observed it was the negligence of A., in not filling up the blank with his own name, that rendered it impossible for the bankers to know or suspect that B. was not dealing properly with the document ; if A. had so marked the bill, and the bankers had taken it without any inquiry, perhaps the result might have been different. Mr. Justice Bayley, however, differed from the rest of the Court, and considered that exchequer bills were not on the same footing as bills of exchange, and, therefore, not within the law and custom of merchants, as applicable to bills of exchange, but that they were to be taken to be goods and chattels, and sub-

(o) *Ex parte Farley*, 1 M. D. & De G. 683.

(p) *Wookey v. Pole*, 4 B. & A. 1.

ject, therefore, to the rule that the pawnor of goods cannot, in general, convey a better title than he possesses, and that the bankers were guilty of negligence in not ascertaining B.'s right to dispose of the instrument.

Promissory Notes.—The payee of some promissory notes of the East India Company, by power of attorney, authorized his agents at Calcutta, a firm of bankers, to “sell, indorse and assign” the notes, which were transferable by indorsement and payable to bearer. The agents, in their character of bankers, borrowed money of the Bank of Bengal, offering, as a security, these promissory notes. The Bank of Bengal made the advance, the agents indorsing the notes, and purporting to make the indorsement as attorney for their principal; they deposited the notes with the Bank of Bengal by way of collateral security for their personal liability, at the same time authorizing the Bank of Bengal, in default of payment, to sell the notes, in reimbursement of their advance. The agents afterwards became insolvent, and default having been made in payment, the Bank of Bengal sold the notes and realized the amount of their loan. The indorsement of the notes by the bank was considered to be within the scope of their authority given them as agents of the payee by the power of attorney; and, consequently, the payee could not recover in detinue against the Bank of Bengal (q).

A banker, having made advances to A., takes his promissory note for 400*l.*, payable on demand, with lawful interest, as a security for the advances. The banker subsequently indorses the note to B., as a security for money placed in his hands by B. Some time afterwards A. and the banker settle their accounts, and A. pays the balance, but neglects to ask for the note, which is not delivered up

(q) *Bank of Bengal v. Macleod*, 5 Moore, Indian App. 1; 7 Moore, P. C. 35; *S. P.*, *Bank of Bengal v. Fagan*, 5 Moore, Indian App. 27; 7 Moore, P. C. 61.

to him. Then the note passes backwards and forwards several times between the banker and B., during all which time the former was indebted to the latter in more than 400*l.*; the banker, on one of these occasions, telling B. that it must not be negotiated, as he should want it when he settled accounts with A. When this communication took place did not appear exactly, but it was before the last time the note was deposited with B. : and it was held to be decisive to show that it was not negotiated to B., but only deposited with him as a pledge. It was held, therefore, that B. (or his assignees on his bankruptcy) could not, after the settlement of accounts between A. and the banker, without a re-delivery of the note to A., recover on it against A (*r*).

Where bankers take the security of a joint and several promissory note, signed by the customer and another person, as surety for a floating balance in their account with the customer due to them, the surety is held to be released by the bankers' crediting the customer with the full amount of the note, without advancing the money at the time (*s*).

When a bank, with the knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in the bank's favour by A. (a person just come of age), unreservedly in the power of B., (a person who stands *in loco parentis* to A.,) knowing at the time that B. claims to be a creditor of A. to a large amount for necessaries supplied, and B. afterwards misappropriates the money, the bank will be restrained from suing on the note, and the note will be declared to be invalid (*t*).

Bonds and other Securities.—A trader deposited with his bankers a bond for the payment of a sum of money,

(*r*) *Roberts v. Eden*, 1 B. & P. 398.

(*s*) *Archer v. Hudson*, 7 Beav. 551.

(*t*) *Dettmar v. Metropolitan and Provincial Bank*, 1 Hem. & M. 641 ; 10 L. T., N. S. 63.

with interest, given by X. to Y.; certain bills of exchange drawn by Y. and accepted by X. (as security for the payment of which the bond had been given); and a mortgage of the bond and bills by Y. to the trader, it was decided that as it had been already settled by former decisions that bills of exchange, when deposited, did not require notice to be given to the debtor to take them out of the operation of the bankrupt laws, as to order and disposition; so a bond which was given to secure the payment of bills of exchange, for the benefit of the holders, did not, under these circumstances, require notice to be given to the obligor (*u*).

In a former case, however, notice was held to be necessary to give validity to a deposit of a warrant of attorney, which was expressed to be executed to secure payment of bills of exchange, one of which was deposited as part of the security. But in that case the deposited bill had not been indorsed, and there was only an equitable right in the depositor to have his security completed by the indorsement of the bill (*x*).

A deposit, by way of mortgage, of a land order of the New Zealand Land Company is good, although no notice be given to the company of the deposit (*y*).

Where C. deposits, as security for an advance, a bond given by B. to A.; C. dies in embarrassed circumstances, after having paid A. the amount, but without B.'s knowledge, the bank may sue B. in A.'s name (*z*).

A banker, taking security from a customer, by a bond executed by the customer, and A., as his surety, conditioned for the payment of all sums already (at the delivery of the bond) advanced, or thereafter to be advanced, by the banker to the customer, does not necessarily lose his right of suing the customer, as on a simple contract, for

(*u*) *Ex parte Barnett*, 1 De Gex, 203.

(*x*) *Ex parte Price*, 3 M. D. & De G. 586.

(*y*) *Ex parte Barnett*, 1 De Gex, 203.

(*z*) *Lucas v. Wilkinson*, 26 L. J., Exch. 13; 1 H. & N. 420.

the balance of the customer's account, at any time after the making and accepting of the bond. In other words, the simple contract debt is not merged in the specialty (*a*), at least when the balance is due to a banking co-partnership, and the bond is given to two persons, managing directors of the company for the time being, especially if it appear that the bond was, in truth, neither given nor taken with any intention of being applied to cover more than a specific sum, whilst the balance might become larger than that sum, so that the bond was clearly intended as a collateral security only. It is to be observed also that there was no actual debt in existence at the time of giving the bond; and, consequently, there could be no merger or extinguishment (*b*).

Where a person gives a promissory note to a bank, it being made by him in their favour, with the intention thereby to satisfy a liability from which he was discharged at law, but in ignorance of the facts constituting such discharge, there the bank cannot enforce the note, although the drawer had the *means* of knowing the facts (*c*).

A trading firm in Calcutta, having borrowed a sum of money from the Bank of Bengal, deposited East India Company's paper with the bank to a greater amount, as collateral security, accompanied with a written authorization to the bank, in case of default of repayment of the loan by a given day, to sell the East India Company's paper for the reimbursement of the bank, rendering to the firm the surplus. Before default the firm is declared insolvent, under an Indian act, similar to the 6 Geo. IV. c. 16, by which, when mutual credit has been given by the insolvent and any other person, one debt or demand may be set off against the other, and all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian act.

(*a*) *Holmes v. Bell*, 3 M. & G. 213; 3 Scott, N. R. 479.

(*b*) *Price v. Moulton*, 10 C. B. 569.

(*c*) *Bell v. Gardiner*, 4 M. & G. 11.

At the time of the adjudication of insolvency, the bank were also holders for value of two promissory notes of the same firm, which they had discounted for them previously to the transaction of the loan and the deposit. When the time for the repayment of the loan expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due upon the loan, produced a considerable surplus. In an action by the assignees against the bank to recover the surplus, it was held, that the bank could not set off the amount of the promissory notes which were then due and unpaid, and that the case did not come within the clause of mutual credit in the 6 Geo. IV. c. 16, s. 56.

It is to be observed that the bank gave credit to the firm for the amount of the notes, but there was no corresponding credit given by the firm to them; it was therefore uncertain whether there would be any money coming to the firm or not; and if the assignees had redeemed the company's paper, there would not have been any; the credit was all on one side (*d*).

If a trader has securities lent to him in order that by depositing them he may get credit with the bank of A., he is not authorized, after having redeemed them from the bank of A., again to deposit them in order to obtain credit with the bank of B., although the securities had been indorsed to him (*e*).

When a trader deposits securities in his possession for the purpose of obtaining credit, and does so without the knowledge of the owner of the securities, he is not to be considered, if he redeems them, to have given a fraudulent preference to the owner (*e*).

Marriage Settlements.—In a case where a person had assigned his life interest, under his marriage settlement, in

(*d*) *Young v. Bank of Bengal*, 1 Moore, P. C. 150, more fully, 1 Deac. 622.

(*e*) *Sinclair v. Wilson*, 24 L. J., Chanc. 537.

stock, standing in the names of the three trustees of the settlement to A., and shortly afterwards A. had communicated the fact to one of the trustees, who, however, was not the acting trustee, and the communication was not made with any intention of giving validity to the assignment, and A. had several subsequent communications with him on the subject: it was held, that the object with which the communication was made was immaterial, and that notice to one trustee was notice to all (*f*). If the trustee has actual knowledge at the time the transaction takes place, the principle of law may be taken to be (*g*), that what a man knows for one purpose he knows for all; and you do not inquire whether he learnt it in one character or in another (*g*).

But in the case of executors notice to one is not in all cases notice to all, though the others in point of fact never heard of any dealings at all (*h*); at least, when the transaction is between the acting executor and his son, the father being an interested party, and there being no ground to presume that the fact was communicated to the others, each of whom had separate authority to receive and pay (*h*).

Goods.—A pledge of jewels is made, as security for a debt at the time of the pledge existing. The customer afterwards borrows other sums upon a general account, and then insisted upon his right of redeeming the jewels, on payment of the first debt only. It was held that he must pay the whole; but it was admitted that if there had been bond creditors, or in case of a bankruptcy, the pledge could have been retained only for the first sum, and the bankers in such case must have come in under the *fiat* for the remainder (*i*).

(*f*) *Smith v. Smith*, 2 C. & M. 231; *Meux v. Bell*, 1 Hare, 73.

(*g*) See 1 Hare, 88. Notice to the solicitors of trustees is good notice to them. *Foster v. Blackstone*, 1 M. & K. 297; *S. C.*, 9 Bli. (N. S.) 375.

(*h*) *Tunson v. Ramsbottom*, 2 Keen, 35, 53.

(*i*) *Demainbray v. Metcalfe*, Prec. Chanc. 419; 2 Vern. 691, as explained in *Adams v. Claxton*, 6 Ves. 229, per Sir W. Grant, M. R.

Bankers advanced a sum of money to the wife of a person absent in India, on the security of a chest of plate, deposited with them, and on the guarantie of a customer. This sum was repaid to the bankers. Afterwards they advanced another sum, with the consent of the guarantor, the plate still remaining in the custody of the bankers; the wife had authority to pledge the plate in case of emergency, and the customer himself repaid the second loan. The husband afterwards died intestate, and his representatives sued the bankers for the recovery of the chest of plate; but the plea of the bankers that they held it by virtue of the customer's lien and by his request was a good answer; for that, under the circumstances, the bankers might be taken to have made the second advance on the credit of the customer, who consequently had a lien on the chest of plate, although there was no previous arrangement or contract with him (*k*).

If the security offered be goods, the banker ought to bear in mind the imprudence of entering into such a transaction by way of half measures; the transaction ought to be made complete, or not entertained at all; it ought, for the banker's safety, to be left on such a footing as will bear legal scrutiny, or it ought never to be taken in hand. To make such a transaction valid there ought to be a bill of sale executed by the debtor and registered under the provisions of the Bills of Sale Act, 17 & 18 Vict. c. 36 (*l*), and if the debtor is a trader, possession should be taken within twenty-one days, or otherwise the goods, in the event of bankruptcy, will pass to his assignees (*m*).

Neither must bankers secure themselves at the expense of the creditors by a bill of sale which deprives the grantor of all his property, as the execution of such an instrument is an act of bankruptcy. Therefore, where traders, having

(*k*) *O'Connor v. Marjoribanks*, 7 Jur. 834; 4 M. & G. 435.

(*l*) A similar statute, the 17 & 18 Vict. c. 55, applies to bills of sales given in Ireland.

(*m*) *Badger v. Shaw*, 29 L. J., Q. B. 73; *Ex parte Marjoribanks*, 1 De Gex, 477.

overdrawn their banking account, and being hopelessly insolvent, gave to their bankers a bill of sale comprising their whole property, to secure the existing debt and future advances, with an understanding that no further advances were to be made until the debt was reduced to a certain sum. Two days afterwards they sent letters to their creditors, offering a composition of ten shillings in the pound: it was held, that the bill of sale was an act of bankruptcy, and invalid in the hands of the bankers, to secure to them their advances in priority to the other creditors of the debtor (*n*).

A document stating goods to have been deposited as a security for the repayment of money lent, and containing in default of payment a power of sale, does not require to be stamped as a mortgage deed (*o*).

Ships and Cargoes at Sea.—A banker may take an assignment, by way of mortgage, of a ship and cargo, while the ship is on her voyage, which will operate in equity to assign as well the future cargo as that, if any, which existed at the time of the assignment, and if notice is sent to the master of the vessel, and the master delivers up possession of the ship and cargo shortly after her return from the voyage, the equitable title of the banker will be considered to be complete, and not to be defeated by a judgment creditor of the assignor who afterwards takes the ship and cargo under a writ of execution (*p*). A., by a deed of the 11th of November, 1857, assigned the cargo with which the ship *Esturias* was then laden, and which thereafter should be put on board, to B. for securing the balance of a banking account. On the 23rd of January, 1858, notice of the deed was sent directed to the captain of the ship, “west coast of Africa,” but it never reached him. At the date of the assignment, B. had reason to

(*n*) *Lacon v. Liffen*, 32 L. J., Chanc. 315.

(*o*) *Attenborough v. Commissioners of Inland Revenue, in re Wright*, 11 Exch. 461; 25 L. J., Exch. 22.

(*p*) *Langton v. Horton*, 1 Hare, 549.

expect that the *Esturias* would soon sail on her homeward voyage. In fact, she was then on the west coast of Africa taking in and seeking cargo. On the 18th of January, 1858, she was still taking in and seeking cargo, and between the 1st and the 11th of February received part of the cargo of another ship belonging to A. On the 1st of March, A. became bankrupt. On the arrival of the *Esturias*, the master was served with notice of the assignment, and A.'s assignees afterwards claimed of B. the cargo; and it was held, that the deed operated as an equitable assignment of the cargo, there being no distinction between the cargo put on board before the assignment and the part put on board afterwards, and that there was no default in B. in not giving notice of the deed, and that consequently the cargo was not in A.'s order and disposition as reputed owner by the consent and permission of the true owner. The court seemed to think that B., under the circumstances, was not bound to have given any notice at all to the captain (*q*). An owner of a ship, executing an absolute transfer of his interest therein, is not precluded from showing that the real intention was to give the transferee only a security by way of mortgage for an advance of money (*r*). Equitable mortgages of ships are therefore valid and enforceable in equity, without registration (*s*).

If bankers take from a consignee of goods in consideration of advances the security of a bill of lading (indorsed generally to bearer), and of a policy of insurance on a ship and goods effected by the consignee, in pursuance of an agreement with the bankers, both deposited with them, and they pay the premium to the insurance company, the insurance being in fact effected to secure them, they may sue in their own names upon the policy for the loss or damage incurred; if, on the other hand, the consignee had in the first instance insured the ship and goods, not in the capacity of agent for the bankers, but in the ordinary way

(*q*) *Acraman v. Bates*, 29 L. J., Q. B. 78.

(*r*) *Ward v. Beck*, 13 C. B., N. S. 668; 32 L. J., C. P. 113.

(*s*) *Stapleton v. Haymen*, 2 H. & C. 918; 33 L. J., Exch. 170.

of business, and then had agreed for the deposit of the bill of lading and the policy with them, the action could only have been brought in the name of the consignee (*t*).

One of two partners, whose firm had an account with a bank, obtained discount of a promissory note made by the firm from the bank, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared accordingly, purporting to be made by both partners, but it was in fact executed by one only, the other refusing. At the time of the execution of it one of the ships was lost, but the fact was unknown to the parties. The security was held to be binding on the firm, notwithstanding the execution by one partner only, and to pass the insurance money, although the deed was not registered according to the Shipping Acts. The deed purported to be for securing the balance of an account current. Notice was given by the bank to the underwriters previously to any act of bankruptcy. The case was considered to be distinguished from cases in which the Courts have laid down or acted on the rule, that one partner cannot bind his copartners by deed by the circumstance that there was a previous contract by or on behalf of the firm to execute the mortgage (*u*).

The following case is somewhat peculiar, but may properly be stated here, with a view to further illustrating the position of bankers, as regards questions relating to security on goods on board of a ship.

Brown, a merchant at Liverpool, had a banking account with Smiths, Sons & Co., bankers in London, who also carried on the business of merchants, under the firm of Smiths and Atkinson, in London, and it was agreed that, for the purpose of securing advances, which Smiths, Sons

(*t*) *Sutherland v. Pratt*, 12 M. & W. 16; *Gardner v. Cazenove*, 1 H. & N. 423.

(*u*) *Ex parte Bosanquet*, 1 De Gex, 432.

& Co. might make to Brown in answering his drafts, &c., Brown should remit them good bills of exchange, should lodge a credit with two houses in Hamburgh, against goods consigned to those houses, to a certain amount of which Smiths, Sons & Co. should avail themselves, and also as a collateral security, that Brown should consign to the house of Smiths and Atkinson certain goods on sale for their account; and accordingly Brown remitted to Smiths and Atkinson the invoice of a cargo and bill of lading, indorsed in blank. But the ship, in which the cargo was loaded, was prevented leaving Liverpool, by an embargo. Some time afterwards Brown became bankrupt, the balance of accounts being in favour of Smiths, Sons & Co., and the cargo was delivered by the captain of the ship to the assignees. It was held, that the indorsement and remittance of the bill of lading to Smiths and Atkinson, in accordance with the previous agreement of the parties, changed the property in the goods, which were to remain in their hands clothed with the trust expressed in the agreement, and that Smiths and Atkinson might, therefore, maintain trover against the captain, to recover the value of the cargo (*x*).

As there is no doubt that a person may give an effectual security upon property of his at sea, before it has come to hand, so he *may* also pledge a policy of marine insurance with another person, or with bankers, and they, if due notice has been given to the underwriters or insurance company, will be entitled to receive the principal sum insured, upon the event insured against happening. The following facts are detailed, for the purpose of showing an instance of a defective deposit of this class.

A. opens an account with a bank, the arrangement being, that he should be allowed to overdraw to a certain amount, but that, if he overdrew beyond that amount, he should find security; eventually he overdrew beyond the specified amount, without finding security; the bank pressed for payment of the whole, or at least a portion of the balance.

(*x*) *Haille v. Smith*, 1 B. & P. 563.

A., in reply by letter, stated that the arrival of the ship *Tagus*, which was daily expected, would enable him to adjust the account, and inclosed a policy of insurance on the cargo of the *Tagus*, indorsed payable to the manager of the bank, the indorsement being signed by A. The bill of lading was not deposited, and when the bankers applied for it, A. stated his inability to part with it, acknowledging that he was in insolvent circumstances, and could not, in duty to other creditors, part with the possession of any of their assets. On these facts, it was held that the letter and indorsement of policy did not create such a specific charge or lien on the cargo, as would entitle the bank to *priority* over general creditors (*y*).

This case turned entirely on the expressions used in the letter.

On Change of Firm.—The question may frequently arise, in practical banking, as to the effect of a change of firm, upon a security deposited with the bank before the alteration. The following case will tend to explain the position of the bank in such circumstances.

A. deposits with a bank, by way of security, for advances, a joint and several promissory note, made payable to order on demand, with interest, whereby A. & B. promised to pay on demand Pease and others and R. H., or order, 300*l.*, with interest. A. pays interest regularly. At one time he had a balance in the bankers' hands exceeding the amount of the note. After the note is deposited the firm changes. Held by the Court—

1. The note being a continuing security, inasmuch as it is made payable to order, might be indorsed, notwithstanding the change in the banking firm.

2. The note not having been indorsed, the original payees, being a partnership, or the survivors of them, were the proper parties to sue upon it.

(*y*) *Jones v. Starkey*, 16 Jur., Chanc. 510. A person may give a valid security on merchandize at sea belonging to him, although at the time he is in ignorance of the particulars of which it consists, *Ex parte Kelsall*, 1 De Gex, 352.

3. The note was not discharged, by the fact of A.'s having, at one time, since the deposit of it, in the bankers' hands a balance exceeding its amount (z).

Whenever, therefore, bankers take a security of this kind, it is indispensable for their security, either that they indorse the note within the six years from its date, or that they put it in suit within that time, or that they take care that the interest is regularly paid upon it, in order to make it effectual as a security, and guard themselves against loss.

Where a customer deposited title deeds of a copyhold estate with his bankers, the deposit being agreed to be as a security, not only for a sum already advanced by the bankers to him, but also for any other sums of money which might be afterwards advanced by the firm. Afterwards, one of the firm dies, and another person is afterwards added to the firm, every thing else remaining the same as before in the relations of the customer to the firm. About six years elapse, when a *fiat* in bankruptcy issues against the depositor, and it becomes a question whether the deposit enures to the benefit of the new firm: but it was held that it did; for that the circumstances amounted to a tacit acknowledgment, that the deeds were deposited with the new firm on the same terms as they had been with the old one (a). It may, probably, now be laid down with confidence, that the continuance of the same modes of dealing with the new firm as with the old, and the continuance of the deposit in the hands of the new firm, will be construed into a tacit recognition by the depositor, that the new hold the deeds for the like object and purpose as the old one did, and stand in the same relation to him. Nevertheless, in practice, it is desirable for bankers, in order to avoid all questions, as to whether a sufficient

(z) *Pease v. Hirst*, 10 B. & C. 122; see *Hartland v. Jukes*, 1 H. & C. 667.

(a) *Ex parte Kensington*, 2 Ves. & B. 79, 83; *Ex parte Oakes*, 2 M. D. & De G. 234; *Ex parte Smith*, 2 M. D. & De G. 314; see 19 & 20 Vict. c. 97, s. 4.

period has elapsed to enable the Court to say that the intention of the depositor was clearly manifested, and to make it quite certain that he was aware of the change, &c., to have a fresh memorandum of deposit made, in order to secure the new firm.

Amount Recoverable.—To close this subject, we may mention some considerations, arising out of the proportion, which the value of the security taken bears to the debt which it is taken to secure.

At law, the general principle has been laid down with respect to insolvency, that if the debt to be secured was *less* than the debt assigned, and there was nothing more than a simple assignment of the debt as a security, in such case, the assignees of the insolvent would have an immediate interest in the sum to be recovered from which benefit to the creditors might result, and they would not have been bound to refund to the equitable assignee of the debt all they had recovered; and this being the test at law of the right of the assignees to sue or not for the debt, the right of action in such circumstances would vest in them (*b*).

Again, if the debt assigned be equal to the debt to secure which it is assigned, *i. e.*, equal at the time of assignment, this does not necessarily make any difference; for if the debt secured be subsequently and before the debt assigned has been recovered reduced by payment or by the realization of other securities there would be a surplus applicable to the payment of the insolvent's general creditors, and the possibility of that surplus would vest the title to recover the debt in the insolvent's assignees (*a*).

And the same seems to be the rule at law, if the debt assigned by way of security were greater than the debt to be secured; *i. e.*, greater at the time of assignment. In this case, also, as in the others, the right of action for the debt vests in the assignees (*b*)

(*b*) *D'Arnay v. Chesneau*, 13 M. & W. 809, 810.

In equity, there appears to be no difference whatever with regard to the above points, whether the assignment is of a policy, the sum insured thereby is equal to or less than the sum for which it is taken as a security or partial security by the bankers, or whether it is of a policy for a sum exceeding that due by the assignor to the bankers, so that it is in fact an assignment by way of mortgage; in either case their receipts will be discharges to the insurance office; in neither case can there be any interpleader. If, however, the mortgagor after the date of the assignment of the policy by way of mortgage as security satisfied the bankers, and gave notice to the insurance company that he had done so, so that the mortgage was no longer in force; in such a case the company, other things remaining the same, might have a right to have the relative rights and claims of all parties adjusted by the Court on interpleader (c).

When a limited guarantie has been given, and the limit has been exceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeded the amount of such guarantie (d).

If the guarantee has recovered in such a case the whole sum guaranteed in an action against the guarantor, the right of the guarantor to file a bill in equity for an account and payment to him of such dividends, is not barred by the fact that he might have pleaded a set-off to that extent in the action, but omitted to do so (d).

In 1826, a customer assigns to his bankers an annuity for securing 200*l.*, part of his balance; in 1828, he mortgages to them the equity of redemption of a leasehold estate for securing his general balance of 1,500*l.* The annuity expires

(c) *Dessborough v. Harris*, 5 De G., Mac. & G. 439; 3 Eq. R. 1058; 1 Jur. (N. S.) 986.

(d) *Thornton v. M'Kewan*, 1 Hem. & M. 525; 11 W. R. 140.

in 1847, the sum received in respect of it being more than 200*l.*; interest was paid on the mortgage up to 1832. In 1834, the first mortgagee of the leasehold estate had entered into possession of the property. In 1853, the customer filed a bill in equity against the mortgagee for redemption: and it was held, that the payments of the annuity having exceeded the 200*l.* must be taken to have been made in reduction of the general balance due on the mortgage, and having been made within twenty years were not within 3 & 4 Will. IV. c. 27, ss. 40, 42 (*e*).

As is well known, if A. owes a balance to his bankers, and B. owes him as much or more, and then A., with the assent of B. and of the bankers, assigns to them so much of B.'s debt to him as will cover his debt to them, this is a legal transaction, and A. cannot revoke (*f*).

(*e*) *Staley v. Barrett*, 26 L. J., Chanc. 321.

(*f*) *Hodgson v. Anderson*, 3 B. & C. 842. Nor is it necessary that the promise or agreement by B. to pay to the bankers should be in writing, for the case is not within the Statute of Frauds. S. C.

CHAPTER VIII.

CUSTOMER'S PASS BOOK AND ACCOUNT.

Pass Book.—The course of banking business in London makes the only general mode of stating and adjusting accounts between bankers and their customers, residing in or near the metropolis, to be as follows, respectively:—

A book, called a *pass book*, is delivered by the bankers to the customer, in which at the head of the first page, and there only, the bankers by the name of their firm are described as the debtor, and the customer as the creditor in the account; on the debtor side are entered all sums paid to or received by the bankers on account of the customer, and on the credit side all sums paid to him or on his account, and these entries being summed up at the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio without further mention of the names of the parties, until the book being full, it becomes necessary to deliver a fresh one to the customer. For the purpose of having the book made up by the bankers from their own books of account, the customer returns it to them from time to time; and, the proper entries being made by them up to the day on which it is left for that purpose, they hand it again to the customer, who thereupon may examine it, and if there appears any error or omission it is his business to send it back to be rectified; if he does not, his silence is regarded as an admission that the entries are correct: but no other settlement, statement or delivery of accounts, or any other transaction which can be regarded as the closing of an old, or the opening of a new account, or as varying, renewing or confirming (in respect of the persons or the parties mutually dealing) the credit given on

either side, takes place in the ordinary course of business, unless when the name or firm of one of the parties is altered, and a new account thereupon opened in the new name or firm.

The course of business is the same between such bankers and their customers resident at a distance from the metropolis, except that, to avoid the inconveniencies of sending and returning the pass book, accounts are from time to time made out by the bankers, and transmitted to the customer in the country, when required by him, containing the same entries as are made in the pass book, but with the names of the parties debtor and creditor at the head, and with the balance struck at the foot of each account, and his silence, &c., is regarded as before (*a*).

H. and C., being partners in business, were indebted to their banker, R., in a sum of 979*l*. In 1851, R., with the consent of H. (C. living at a distance) transferred his business to the Midland Banking Company, including the account in question. The partnership account of H. and C. commenced with this item of 979*l*. in the Midland Bank books, but whilst it was open H. paid in monies to an amount exceeding 979*l*. A pass book was regularly sent to H. In 1852, the Midland Bank gave notice to R. that they would not take to this account, there being in the deed transferring the business a proviso, that, at the expiration of twelve months as to such accounts as should not be taken to by the Midland Bank, they should, during a period not exceeding ten years, either accept or compel payment, or permit the same to remain due.

Then an action was brought by the Midland Bank against H. and C. to recover the balance due. But the Court held, that the debt of 979*l*. was extinguished by the payment subsequently made by H. to the credit of the partnership account, and the assent to the appropriation to be inferred from H. not objecting to the pass book, and

(*a*) See the custom of dealing, as found by the master in *Devaynes v. Noble*, 1 Meriv. 535, 536.

that after such extinguishment as between the Midland Bank and the partnership this account could not be treated as an existing debt remaining due (*b*).

A change of the title of the firm in a pass book, and entries therein to the credit of a new firm of the interest of securities given by the customer to the original firm, is notice of the assignment to the new firm of the securities given by the customer to the old firm (*c*).

The pass book between a bank and a joint-stock company is a good source of evidence, to show that the bank paid to the company calls due from A. (*d*); one of the plaintiffs (the banking partnership) being treasurer of the company and A. a subscriber.

Credit given in a pass book binds the bankers; for, by entering the sums to the customer's credit, they lead him to suppose that they had received them on his account; they alter his situation, and therefore shall not be allowed to say that the items had never been received (*e*), unless they can clearly show that the entries were made by mistake (*f*).

But this is subject to the proviso, that the entries in the pass book are properly made on each side of it; a pass book, with entries on one side only, is not evidence of a settled account between the banker and the customer, although the book is kept by the customer, without objection to the entries (*g*).

Entries in a pass book are only *primâ facie* evidence against the banker (*h*).

If an entry is alleged to have been made by mistake in the wrong place in a pass book by the banker's clerk, but

(*b*) *Beale v. Caddick*, 2 H. & N. 326.

(*c*) *Cavendish v. Geaves*, 24 Beav. 163; 27 L. J., Chanc. 314.

(*d*) *Alexander v. Barker*, 2 C. & J. 135. But a pass book is not evidence that a given person was a provisional director of an abandoned company; 16 C. B. 671.

(*e*) *Shaw v. Dartnall*, 6 B. & C. 57.

(*f*) *Shaw v. Picton*, 4 B. & C. 715.

(*g*) *Ex parte Randleson*, 2 Deac. & C. 534; see *Boardman v. Jackson*, 2 Ball & B. 382.

(*h*) *Commercial Bank of Scotland v. Rhind*, 1 Macq. H. L. Cas. 643.

by the customer denied to be any mistake, the question is for the jury upon the evidence (*i*).

Making a false entry in a pass book is a forgery (*k*).

Mode of keeping Account.—When accounts between banker and customer have been carried on for a series of years on a particular footing, it will be presumed that there was originally an agreement to that effect, but acquiescence will not amount to a settlement of account (*l*).

Overdrawn.—When a banker discounts the bills of his customer, his account being overdrawn, and the amount of the discounts is simply carried to the credit of his account, the banker is the holder for value, though no money has actually passed (*m*).

Charging Interest.—A customer, being indebted to his bankers upon an account current, upon which compound interest had according to custom been charged by the bankers, executed a mortgage to them, to secure the amount of the current account. The customer afterwards executed a creditors' deed, of which the bankers were appointed the trustees, and from that time he ceased to draw upon or pay money into the account: it was held that the bankers were only entitled to simple interest from the date of the deed upon the balance due (*n*).

Deducting Income Tax.—Though in discounting bills and making loans for short periods bankers do not usually deduct income tax, yet in a mortgage transaction with their customers they are bound to allow income tax (*o*).

(*i*) *Snead v. Williams*, 9 L. T. (N. S.) Exch. 115.

(*k*) *Reg. v. Smith*, 1 L. & C. C. C. 168.

(*l*) *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Chanc. 756.

(*m*) *In re Carew*, 31 Beav. 39.

(*n*) *Crosskill v. Bower*, 32 Beav. 269; 32 L. J., Chanc. 540

(*o*) *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Chanc. 756.

CHAPTER IX.

GUARANTIES, BONDS, ETC. GIVEN TO BANKERS.

As to guaranties, or bonds, &c., given by third parties to bankers, to secure their advances to customers, &c., it may be useful to examine various decisions, in order to perceive and note the grounds of the law on which they have rested, and the duties and rights of bankers arising out of the principles they lay down.

A customer had three accounts with his bankers, all three of which being overdrawn, he executed a deed poll, reciting the intention to give security and charge estates (already mortgaged) with payment of the three several sums of money which shall or may be found due on the balance of the several accounts for principal and interest, not exceeding the aggregate sum of 3,000*l.* Then he executed a deed of assignment for the benefit of his creditors. The real estate charged by the deed poll was sold by the mortgagee, and after paying all incumbrances a balance remained, which was claimed by the bankers and by the trustees of the creditors' deed; it was held, that the security did not include future balances, and the bankers were therefore defeated in their claim (*a*).

A., a customer of a bank, having overdrawn his account, upwards of 10,000*l.*, B. and others execute a bond to the bankers to secure, guarantee, and indemnify the latter for any sums, which, for ten years, they might advance to A. on bills drawn by him, or made payable at their house, and on all cheques, notes, orders, and other engagements of A., not exceeding 5,000*l.* in the whole, together with interest on the said sums. This bond was not to affect a

(*a*) *In re Medewe or Meadows*, 26 Beav. 588; 28 L. J., Chanc. 891.

prior security given by A. to the bankers; but the bankers gave no notice to B. or to the other obligors, that A. was indebted to them in the above sum, at the time of executing the bond. The bankers continued to make advances to A., who afterwards became bankrupt, and in the final close of accounts, he was indebted to them upwards of 10,000*l.* After the execution of the bond, he had paid in sums considerably exceeding 5,000*l.*; he saw the accounts every fortnight, and received vouchers half-yearly, and knew how the different payments were applied, but never made any objection or gave any directions as to their application.

B. was held to be liable to the extent of 5,000*l.*, but one of the learned judges gave his assent with great reluctance thinking it far from clear that the sureties, on executing the bond, did not intend that any fresh payments, made by A., should go to the new account, leaving the bankers to their remedy, on the former bond, for the reduction of the old account (*b*).

Change of Firm.—A guarantie, given by a person to secure a banking copartnership, consisting of several members, all and every sums or sum of money which might become due to *them*, from a certain customer for money advanced to him upon any bills, &c., made payable at the banking house of the copartnership, does not bind the obligor, after the death of one of the partners, nor cover future advances made after such death and the taking in of another partner; and the customer who, at the time of the death, was indebted to the house, having afterwards paid off the balance incurred previously to the death, the obligor was wholly discharged (*c*).

There is no doubt, however, that a guarantie may be drawn in such terms as will serve as a continuing indemnity to the house, whatever be the change of partners; but then that must plainly appear from the language used (*d*);

(*b*) *Williams v. Rawlinson*, 3 Bing. 71.

(*c*) *Strange v. Lee*, 3 East, 484; *S. P.*, *Weston v. Barton*, 4 Taunt. 67.

(*d*) See form in *Earle v. Oliver*, 2 Exch. 71, 72.

the Courts, both of equity (*e*) and common law (*f*), appear to lean against increasing the liability of a guarantor to a banking firm *in this respect*. This principle of construction, narrowing the liability of a surety, applies quite as strongly from the nature of it, when the advances to be secured are to be made to a firm; for it is obviously an assumption to conclude, that a party guarantees advances to A. and B., because he is willing to guarantee advances to A., B. and C.

And since the decisions, which established this principle, the legislature appears to have ratified and confirmed it, by enacting as follows (*g*):—

“No promise to answer for the debt, default, or miscarriage of another made to a firm, consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm, consisting of two or more persons, or of a single person, trading under the name of a firm, shall be binding on the person making such promise in respect of any thing done or omitted to be done, after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation, or by necessary implication, from the nature of the firm or otherwise.”

Since this statute, therefore, guaranties may either expressly stipulate for the continuance of the undertaking, (when the intention is that it should continue,) notwithstanding changes in the firm; or if the parties choose to take upon themselves the risk of determining that the firm is of such a nature as necessarily to imply the continuance of the guarantie, notwithstanding the change, &c., they may

(*e*) *Pemberton v. Oakes*, 4 Russ. 154.

(*f*) *Chapman v. Beckington*, 3 Q. B. 703.

(*g*) 19 & 20 Vict. c. 97, s. 4.

do so, and need not insert an express provision to that effect; and so they need not insert an express provision, if they choose to incur the risk of proving *aliunde*, this to have been the intention; but it is manifestly the safe and most convenient course in all cases to insert an express stipulation for the continuance of the instrument, notwithstanding any change in the constitution of the firm.

The following examples of decisions on this subject will be useful.

One Teed gave to a banking-house a guarantie on behalf of a firm, expressed as follows:—

“I hereby agree to guarantee to you the repayment of any bills you may honour, to be drawn upon your house by the firm of Carruthers & Co., of Manchester, distillers, and any advances you may make for the said firm of Carruthers & Co. from time to time, not exceeding the sum of 8,000*l.* This guarantie to extend to any current amount or ultimate balance not exceeding the sum of 8,000*l.* and interest, and to continue in force for one year from the date hereof.

“THOMAS TEED.”

This was dated London, June 29, 1839.

One of the firm of Carruthers & Co. having retired from business, a second guarantie was given, thus expressed:—

“Notwithstanding Mr. John Carruthers has retired from the partnership of Carruthers & Co., of Manchester, distillers, and which business is now carried on by Mr. Frederick F. Carruthers, under the said firm, on his own account, I do hereby agree, in consideration of your giving credit to and honouring the drafts of the said firm of Carruthers & Co., to continue the guarantie given by me to your house for the sum of 8,000*l.* for and on behalf of the said F. F. Carruthers alone, upon the same terms, condition and period as expressed in the guarantie given by me to your house, when the said John Carruthers was a partner in the said business. This guarantie for the said F. F. Carruthers to extend to any current amount or ultimate balance not exceeding, as to my liability, the sum of 8,000*l.* and interest, and only to continue in force for the same period as mentioned in my former guarantie.

“THOMAS TEED.”

This was dated London, 27th January, 1840.

During the year to which the latter guarantie was limited, various payments were made by the bankers to the firm, and four bills of exchange, of different dates, amounting together to the sum of 1,975*l.*, were drawn by Carruthers & Co., payable at the banking-house, and accepted by the bankers. On March 14, 1840, after the

acceptance of the four bills, and before any of them were due, one of the partners in the banking-house died, there being at that time a balance (exclusive of the four bills) of 124*l.* 10*s.* 7*d.* due from the bank to Carruthers & Co. on their account.

After the death of the partner in the bank the same course of business was continued between the bank and the firm; but on June 15, 1840, Teed gave the bank notice that he withdrew his guarantie. On July 15, 1840, the firm of Carruthers & Co. became bankrupt.

The following points were decided on these facts:—

1. That the guarantie ceased upon the death of the partner in the bank, within the period for which the guarantie extended.

2. That bills, accepted by the bank before the death of the partner, were within the guarantie, though they were not payable until after that event.

3. That the amount guaranteed could not be increased by any act of the remaining partners after the death and the customer; although such amount might be diminished by such act.

4. That, in the construction of the particular terms used in this guarantie, it could not be held that the amount guaranteed in respect of the bills honoured by the bank was to be reduced by the balance due to the customer from the bank when the guarantie ceased, such balance having been afterwards paid in the course of business between the bank, after the death of the partner, and the customer (*g*).

Where three persons carried on business as partners in banking, the partnership being to expire 19th February, 1807, according to the articles, dated 5th January, 1792, which empowered one of the firm, in case of his death during the term, to bequeath his share in the partnership in favour of his wife and children. That partner died 26th March, 1802, having bequeathed his share, &c., to

(*g*) *Holland v. Teed*, 7 Hare, 50.

executors, in trust, &c., accordingly. The business continued to be carried on under the same firm as before; and the executors interfered in the management, and shared in the profits. Before the death, a customer and two other persons of the one part, and the members of the banking partnership of the other part, executed an indenture, dated 4th January, 1802, by which the parties of the first part did jointly and severally covenant to pay to the bankers, the survivors or survivor of them, &c., upon demand, all sums of money not exceeding 20,000*l.* in the whole, which then were or should at any time thereafter before and until 19th February, 1807, become due and owing from the customer to the parties of the second part, or to the survivors or survivor of them, &c., either for principal money then already lent and advanced, or thereafter within the time aforesaid to be lent and advanced, or for interest then due or to become due thereon, or for money then already paid or lent, or thereafter within the time aforesaid to be paid or lent, &c.

At the time of the death the balance against the customer was upwards of 14,000*l.*; after the death, the customer continued his dealings with the bank as before, and within a few weeks after, paid in more than 14,000*l.*, but within the same period drew out a larger sum. These subsequent dealings were entered in the same account current with the preceding dealings under the same heading, &c.

In February, 1806, the customer stopped payment, being indebted to the bank in upwards of 19,000*l.*

Here it was held, that the banking partnership, which carried on business after the death of one of the partners above mentioned, was a new partnership; and therefore that the surety's covenant did not extend to cover sums advanced by such new partnership; and that the balance due to the bank by the customer, at the time of the death, must be considered to have been discharged by the subsequent payments made by him to the bank (*h*).

(*h*) *Pemberton v. Oakes*, 4 Russ. 154.

Variance in Agreement.—The general rule is, that any variance in the agreement, to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety (*i*).

Thus a bond given to secure certain bankers in London against all debts that might be incurred by a firm of bankers in the country, their correspondents, and executed by the two persons composing that firm, and a third person as their surety, whereby the three jointly and severally bound themselves to repay, &c., such sums as should be advanced by the London bankers to meet bills, &c., drawn by the said two persons, "or either of them," was held not to extend to bills, &c., drawn by one of the two, after the death of the other (*k*).

But if a bond be given to bankers to secure them against further advances, so that these further sums, together with those already advanced, should not exceed 5,000*l.*; and notwithstanding the bankers advance to a greater amount, that will not be construed to operate as vacating the obligation, for the contract is not to be taken as a prohibition of all subsequent advances, but only as a qualification of the surety's liability (*l*); express and clear provisions ought to have been introduced to effect that object (*l*); and, in an action (by the assignees of two of the firm of bankers to whom the bond was given) on it to say, that after the making of it the partnership to whom it was given was dissolved, and a new partnership entered into by the two and a third person, and the balance due to the old firm was transferred to the new one, is a bad plea, and the surety is liable to the assignees (*l*).

(*i*) *Bonar v. Macdonald*, 3 H. L. Cas. 226; see *Stewart v. M'Kean*, 10 Exch. 675; *Newton v. Chorlton*, 2 Drew. 333, 339; *Woodcock v. Oxford Railway Company*, 1 Drew. 521.

(*k*) *Simson v. Cooke*, 1 Bing. 452.

(*l*) *Seller v. Jones*, 16 M. & W. 112; *Parker v. Wise*, 6 M. & S. 247, 250.

Continuing Guarantie.—If by a guarantie, in the condition of which is recited an agreement by bankers to discount bills of exchange, and otherwise pay, lend and advance to the customer, if he should have occasion, any sums of money not exceeding at any one or more time or times, 200*l.* in the whole, and he undertakes to pay to A., B. and C. (the bankers), “and all and every other person or persons who shall or may become partner or partners with them in the said banking business, or any or either of them, or other the firm of the said house for the time being, &c., all and every such sum and sums of money not exceeding the sum of 200*l.* as aforesaid, as the said A., B. and C., or any or either of them, or any future partner or partners of the said firm, or other the firm of the house for the time being, should advance or pay,” &c., this is a continuing guarantie to any future firm, and not merely limited to the first occasion on which the advances reached 200*l.*, but extended to future advances (*m*).

Where A. became surety to bankers for B., the bankers to give B. a draft at three months, but instead they immediately advanced to B. the whole amount: held that A. was discharged, the advance having been made without the concurrence of A. (*n*).

A guarantie for the space of twelve months for the due payment of all such bills as A. might discount for D. & Co., to the extent of 600*l.*, may be revoked or countermanded by a notice given during the twelve months, although some discount may have been made and repaid before the notice (*o*).

In respect of the amount the Courts do not lean towards the side of the guarantor; for, when the question is whether the guarantie is qualified or continuing, and the construction, that it is a continuing one, can be put upon the words, it will be (*p*).

(*m*) *Batson v. Spearman*, 9 A. & E. 298.

(*n*) *Bevan v. Cocks*, 13 L. J., Chanc. 26.

(*o*) *Offord v. Davies*, 31 L. J., C. P. 319; 12 C. B., N. S. 748. See *Bradbury v. Morgan*, 31 L. J., Exch. 462.

(*p*) See *Mayer v. Isaac*, 6 M. & W. 612.

There may be, however, a guarantie on which the surety or guarantor shall only be liable to the given amount once; so that if 200*l.* have been advanced, and 200*l.* paid off, he is no longer liable for anything (*q*).

In a continuing limited guarantie given to the National Provincial Bank there was a proviso, that if the creditors received a dividend from any estate of the principal (the customer) it should not be taken in discharge of the guarantie, but that the creditors should be entitled to recover on the guarantie to the full extent of the limit notwithstanding.

On the bankruptcy of the principal, the creditors proved, and, before receiving any dividend, obtained payment, from the guarantors, to the extent of the limit.

The guarantors were considered not to be entitled to stand in the place of the creditors, as to so much of the proof as was equal to their payment, the creditors not having yet, at the time of the application, been paid in full (*r*).

In a case where merchants procured accommodation from their bankers, on entering, with sureties, into a covenant to pay the floating balance due from time to time up to a certain limited amount, subject to a proviso that, in the event of the merchants' bankruptcy, and in the event of the amount due at that time exceeding the fixed limit, any dividends received, under the bankruptcy, should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends, until the whole of such excess was paid. Some of the sureties obtain a counter security, in respect of their liability, without notice to the bankers. The merchants fail, being indebted to the bankers beyond the fixed limit; the latter receive dividends on the whole debt, and recover the amount secured from the sureties; the bankers were held to be entitled to retain the whole sum so received,

(*q*) *Kirby v. Duke of Marlborough*, 2 M. & S. 22.

(*r*) *Ex parte Miles*, 1 De Gex, 623.

although two of the sureties proved, under their counter security, and, in effect, are paid in full out of the bankrupts' estate (s).

Merger.—Bankers take a bond, entered into jointly and severally by four partners, and two sureties for them, payable immediately, to secure the payment of all such sums of money as, upon the balance of any account current between the partners and the bank, shall from time to time be due, by the partners, to the extent of 1,000*l*. The bankers signed separate judgments (having also taken a warrant to confess judgment) against the obligors: but it was, nevertheless, held that, on the bankruptcy of the partners, they were not bound to prove, on the separate judgments, against each of the bankrupts, but that they might prove, against the joint estate, for any balance that might be due within 1,000*l*.

The bond here was not taken, it will be observed, for any existing simple contract debt; if it had, there would have been a merger in the bond; and then the bond debt would have merged in the judgment.

So, where the original contract is a joint one, and the creditors take a joint and several bond from the debtors, and then enter a joint judgment on the bond, there is a merger of the bond; and there could be no right to prove against the separate estate.

But the difficulty, in respect of the above firstly-mentioned bond, is, that it is not the joint obligation of the bankrupts alone, but of them and two other persons, who must be presumed to be alive; and the rule is clearly established, that you cannot prove against the bankrupts, if the surety be alive and solvent.

It is to be observed, the bank was the creditor, but, in

(s) *Ex parte Hope*, 3 De G., Mac. & G. 720. In general, in the absence of a stipulation to the contrary, a surety paying the debt is entitled to all the securities held by the creditor as against the debtor; see *Ex parte Stokes*, 1 De Gex, 623; and 19 & 20 Vict. c. 97, s. 5; *Pearl v. Deacon*, 24 Beav. 186.

fact, the bond was given to two persons as trustees for them, it was therefore a collateral security, and did not merge the joint simple contract; it is a bond from the six to the two, conditioned to be void upon payment by the four to the two (*t*).

A joint-stock banking copartnership took a joint and several bond, given to two trustees for them, from several persons, viz., the four members of a trading firm and two other persons, purporting to secure to the bank all and every such sum of money as, upon the balance of any account current, which then was, or at any time or times thereafter should be, open between the trading firm and the bank at any of the establishments of the bank, should from time to time be due and owing from, or by the trading firm, their executors, &c., together with all discount, postage and commission, according to the usage and course of business; but, nevertheless, to the extent only of 1,000*l.* principal money, exclusive of interest and costs, in case such balance should exceed that sum. The bank was to be at liberty to recover that sum, though accounts had been settled between the parties, and balances had been paid before the bank proceeded on the security; and there was a warrant of attorney, for entering up judgment on the bond, in order the better to secure the advances which should be made. The bank entered up six several judgments against the obligors of the bond, and the traders having become bankrupt, the question was, whether for the balance of the account, as it stood at the date of the bankruptcy, the bank was at liberty to prove against the joint estate of the traders as for a simple contract debt; and it was decided that the bank might do so, the original liability not being merged or barred by the bond or judgments, for the bond was not conditioned for any payment to be made by the six persons to the two persons to whom the security is given, but was a bond from the six to the two, conditioned to be void upon pay-

(*t*) *Ex parte Banks*, 2 J. & L. 212.

ment by the four to the bank, and was therefore only a further and collateral security (*u*).

Time or Indulgence given to Principal.—It may be laid down without qualification, that where a joint and several bond is taken by way of security, that time, or indulgence, has been given by parol to the principal debtor, is an answer *at law* on the part of an obligor, who has executed the bond as surety (*v*), either by means of an equitable plea in an action, under 17 & 18 Vict. c. 125, s. 83, or the remedy, if any, is to be sought in equity (*w*).

Where, however, there has been an absolute release, by the obligee, to one of two joint and several obligors, both are discharged; also, if the obligee releases to one obligor, and the other, in consideration of the forbearance, undertakes to pay the debt, the debt, nevertheless, is absolutely discharged (*x*).

Such a transaction as the following may be mentioned, as one that affords a warning to bankers, taking securities, for advances.

If A. is persuaded to execute covenants for repayment of a loan to a borrower from the bank, in the expectation and on the faith that B. will also execute it and become a co-surety, jointly and severally responsible with himself and the borrower, and B. never, in fact, executes the deed, but the money is in fact advanced, and no notice of B.'s failure to execute is given to A., until the principal debtor has made default and become insolvent, A., in equity, is discharged from all liability, and will have the bond given up to him to be cancelled (*y*).

In fact, a principal point with regard to guaranties, taken by bankers, which it behoves them to attend to, is,

(*u*) *In re Clarkes*, 2 J. & L. 212.

(*v*) *Davey v. Prendergrass*, 5 B. & A. 187; *Bulteel v. Jarrold*, 8 Price, 467; *Trent Navigation Company v. Harley*, 10 East, 34.

(*w*) *Parker v. Watson*, 8 Exch. 410; *Elliott v. Mason*, 26 L. J., Exch. 175.

(*x*) *Parker v. Lawrence*, Hob. 70; Co. Litt. 232, n.

(*y*) *Evans v. Bremridge*, 25 L. J., Chanc. 102; 2 Kay & J. 174.

that "giving time," as it is called, to the principal debtor, without assent of the surety, discharges the surety; that is, if the principal is indulged with more time, in which to discharge his debt, than is according to the known course of dealing between the parties, or the legal obligation of the debtor in the circumstances, then, provided that indulgence does not arise out of mere inactivity on the creditor's part, but arises out of a binding contract, which prevents the creditor from being in a condition to sue for a given period; that lets off or discharges the surety, and relieves him from all liability to the banker, to whom he has guaranteed his principal (2).

W. Jones gave the following guarantie to a bank, on behalf of Henry Bowers:—

HENRY BOWERS' MILL ACCOUNT.

"Please to open an account with, and honour the cheques of, Mr. H. Bowers on 'mill account,' for whom I will be responsible.

"*Carmarthen, January 4, 1825.*

W. JONES."

W. Jones was an attorney, and the professional adviser of the bankers, and, at the time, had a banking account with them. The bankers, upon receiving the document, opened an account with Bowers, and made various advances to him up to February, 1827, when they ceased to advance to him. It was the course of business of the banking house occasionally to take the acceptances of their customers for the balance appearing to be due on the face of their accounts, which were termed *covers*; and the same was also shown to be the practice of a neighbouring bank. Jones was proved to have sometimes been consulted by the bankers, as their professional adviser, with respect to these acceptances; but it was not proved that he had personally any knowledge of the practice to require these bills as covers for overdrawn accounts.

In February, 1828, without Jones's knowledge or consent, the bankers took Bowers's acceptance, at three

(2) *Samuell v. Howorth*, 3 Mer. 278; confirmed in *Creighton v. Rankin*, 7 Cl. & F. 316; *Heath v. Key*, 1 Y. & J. 434.

months, for the amount of their balance against him, and this bill was carried to the credit of his account, but was dishonoured at maturity.

In 1832, the bankers became bankrupt, and in an action by their assignees against Jones, commenced in 1833, it was adjudged that the bankers, by taking the acceptance, had given time to Bowers, the principal, and thereby had discharged Jones, the guarantor or surety (*a*).

It is not necessary for the bankers who are taking the guarantie to make any statements how the account has been kept; whether the customer has been in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; *unless questions be particularly put by the surety to gain information on these points*, on all which it is material for him not to be in the dark; if questions are put the bankers must, of course, answer correctly; otherwise it would probably be found that the guarantie would be ineffectual (*a*).

A guarantie was given by a person to the Craven Bank, to secure all sums due, or which might become due, from a customer, to the extent of 1,000*l.*, providing, that if the guarantor should give notice in writing to the bank, determining the guarantie, he should be liable only to the extent aforesaid for the amount due at the time of giving notice, but not for any money advanced or liability incurred by the bank subsequently to such notice.

The date of this instrument was the 14th February, 1850.

The customer subsequently, when the balance against him reached 1,000*l.*, and on a further advance by the bank of 300*l.*, executed a warrant of attorney to confess judgment for 2,600*l.*, subject to a defeasance, on payment of the floating balance of his account, not exceeding 1,300*l.*, and with a proviso that the guarantie given should not

(*a*) *Howell v. Jones*, 1 C. M. & R. 97. To impeach a guarantie, on the ground of concealment of material facts, such concealment must be shown to be fraudulent; *North British Insurance Company v. Lloyd*, 10 Exch. 523, 533; *Withes v. Labouchere*, 5 Jur., N. S. 502; 3 De G. & J. 593.

in any manner be prejudiced or affected by the warrant of attorney.

The date of this instrument was the 19th March, 1851, and contemporaneously an agreement was signed by the customer, the guarantor and the bankers, whereby it was agreed that the memorandum of guarantie of the 14th February, 1850, should not be in any manner prejudiced or affected by the execution of the warrant of attorney, or by any judgment to be entered up and execution issued thereon, and that all monies recovered under the warrant of attorney should be first applied in reduction of the balance of the banking account of the customer remaining due at the time of levying the execution, before the memorandum of the 14th February, 1850, should be capable of being performed or satisfied by the guarantor, either wholly or in part, to the end and intent that the guarantie should remain effectual to the extent of 1,000*l.* after judgment should have been entered up on the warrant of attorney and execution levied in pursuance thereof, and the proceeds of such execution placed to the credit of the customer's account. And it was further agreed, "that for the privilege or protection of the guarantor, in addition to the proviso contained in the memorandum of the 14th February, 1850, for discharging him from continuing his responsibility, on his giving notice to the bank of his desire to be so discharged, the bank should, on being required to do so in writing by the guarantor, although such requisition should in nowise be necessary as between the bank and the customer, enter up judgment on the warrant of attorney, and levy execution against the goods of the customer as soon as practicable, and apply the proceeds of such execution in reduction of the balance of the customer's account."

The warrant of attorney was not filed pursuant to the 12 & 13 Vict. c. 106, s. 136, in order to be available in the event of bankruptcy, as required by that section.

On the 24th March, 1851, judgment was entered up on it.

On the 25th August, 1851, the guarantor, by notice in writing, required the bank to levy execution; this was done, and goods sold under it to the amount of the debt due from the customer to the bank. Shortly after the customer became bankrupt, and his assignees recovered back from the bank the amount levied under the execution by reason of the omission to file the warrant of attorney, or a copy of it, according to the provisions of the above statute. The bankers afterwards proved under the bankruptcy, and having received two dividends of 7s. 6d. and 8d. in the pound respectively, on their debt, they brought an action against the guarantor, on the guarantie: but it was held in equity that the agreement to issue execution was valid and binding, but that, *by the omission to file the warrant of attorney*, the guarantor was discharged (b).

A customer, having overdrawn his account with his bankers, on their requiring security from him, deposits with them certain title deeds, and prevails on A. to join him as surety in a promissory note for 400l., payable in twelve months, to the bankers. Soon after that note became due, the customer and A. gave the bankers another joint note at twelve months, dated the 14th April, 1813, in exchange for the note which had become due, and the customer still kept a running account with the bank, and in the course of that twelve months paid in very large sums. In January, 1815, the customer entered into a composition deed with his creditors, whereby his debts were compounded for ten shillings in the pound. The last note was stated to have been given with an express understanding that the surety would not be answerable for a longer period than the twelve months. Between the giving of the note and the date of the composition deed the surety never had any application made to him respecting the note; but in 1816, a person to whom the promissory note had been indorsed for the first time demanded payment of the surety, who took no notice of the application. Several months afterwards, the note having

(b) *Watson v. Allcock*, 4 De G., Mac. & G. 242; 22 L. J., Chanc. 858.

been returned to the bankers, they sued the customer: and the Court held that he *was not discharged*; for that the *onus* lay on him to take care that the note was satisfied; that his situation had not been changed to his prejudice; that the composition was to his advantage, to the extent of ten shillings in the pound, as much as if the bankers had received so much from him in part payment, and that the time that had elapsed, and the want of earlier notice, made no difference (c).

A promissory note is made jointly by A. and B. to secure to a bank the payment of advances made by them to A., to the extent of 250*l.* The note was made payable at one month. After it became due, and without the privity of B., it was agreed, between A. and the bankers, that A. should execute a warrant of attorney to a third person as trustee for the bankers to secure the amount of the note, and of a further advance made by the bankers to A.

In such case the note does not merge in the warrant of attorney (d).

Also the acceptance by the bank of the fresh security, without any binding engagement by them to give time to A., does not discharge the surety B. (d).

Here it will be observed, the warrant of attorney was not between the same parties as the original liability.

On April 25, 1803, a customer, together with another person, executes a joint and several bond to his bankers to secure to them the repayment of the sum of 1,000*l.* (advanced by them to the customer) with interest, on the 25th April, 1804.

At the date of the bond the customer's account with his bankers, exclusive of the above sum advanced, showed a balance in his favour; he also paid money into the banking house after that date, and before 25th April, 1804. At the end of 1804, the customer's account, independently of the 1,000*l.* (which was not repaid) was overdrawn. In January, 1807, a settlement of accounts took place be-

(c) *Perfect v. Musgrave*, 6 Price, 111.

(d) *Bell v. Banks*, 3 M. & G. 258.

tween the customer and the bankers, when the sum of 2,259*l.* was found to be due from him to them, the whole of the 1,000*l.* secured upon the bond being treated, on occasion of this settlement, as a debt remaining due from him.

The bankers then agreed to give him time for payment on his giving security for the whole balance; and on January 23, 1807, he executed a warrant of attorney to the bankers to confess judgment against him for the payment of the 2,259*l.* by instalments, several of which he paid, but became bankrupt before the whole was discharged, a sum of 1,100*l.* remaining still due.

It was proved that the surety was privy to the above-mentioned settlement of accounts, and to the facts respecting the warrant of attorney.

On these facts it was considered the surety was not discharged by the time given to the customer, and that the bond was not discharged by the payments made by the customer before it became due, for these were to be considered as made on and applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities (e).

But where bankers took a bond from a customer and his surety, by which it was stipulated that the surety was to be liable only to the extent of 6,000*l.*, if upon the account that amount should be due, and subsequently the balance of the customer's account appearing to be 9,500*l.* against him, the customer gave the bankers a mortgage for 4,000*l.*, and it was agreed between them that the residue should be paid by instalments; and the customer also gave a warrant of attorney to confess judgment for the residue, *expressly without prejudice to any other securities held by the bankers for the said sum or any part of it*; there it was said, that it may in many cases be a very rational provision, that the principal shall have time, provided he can have it without prejudice to the remedy against the surety, which though worth nothing at present

(e) *Tyson v. Cox*, T. & R. 395.

may in a year's time be very valuable, and the creditor may very reasonably mean to secure the benefit of that contingency; but the bankers were nevertheless restrained from suing the surety (*f*).

Where parties are acting by virtue of an act of parliament, to which every one must be considered as subscribing, and there are provisions opposed to the supposition that those to whom the guarantie is given have the power of delaying to put in suit the instrument against the surety upon a breach occurring, and they do nevertheless lie by and indulge the principal, though not by means of a binding contract, still the surety will be absolved (*g*).

How to take Guaranties.—It is indispensable in order that bankers should obtain the benefit of the securities they take for them to act, not merely with perfect openness and candour, but with vigilance and circumspection. Many suppressions and unintentional misrepresentations carry with them the effect of fraud both at law and in equity, and in consequence will invalidate transactions otherwise unquestionable; much more has wilful concealment of facts obviously material for the surety to know previously to his entering into the contract, the effect of fraud, that is to say, it will vitiate the whole transaction as regards the bankers' power of recovery from the surety.

The following case supplies an instance of the former proposition.

Certain bankers advanced 2,600*l.* to A. upon the security of an indenture of mortgage to them of certain property of A., and also of a joint and several promissory note of the same date as the deed, in which a third party joined with A. as surety. At the time of this advance A., who had long been a customer, owed them 800*l.*, and it was arranged, between him and the bankers, that this sum should be deducted from the 2,600*l.*, but neither by the recital in the mortgage deed nor otherwise was the surety apprised that

(*f*) *Boulton v. Stubbins*, 18 Ves. 20.

(*g*) *Bank of Ireland v. Beresford*, 6 Dow, 233, 239.

such was the case, and that recital moreover expressly, but falsely, stated that the entire interest in a 1,500*l.* policy of assurance, already deposited with the bankers, would be available as collateral security for the 2,600*l.*, inasmuch as the 800*l.* had been repaid to the bankers. The mortgage deed was prepared by the bankers' solicitor, and read over in his office to the surety and A. previously to its execution and to the surety's signature of the promissory note. The circumstances were held to constitute such a fraud in law as released the surety (*h*), although it was not suggested that any intentional fraud was imputable to the bankers personally.

Release of Surety by Bankers' Neglect.—The neglect or laches of bankers may release a surety in many cases.

Richard Cox was a banker in copartnership with Messrs. Morrell, under the firm of Cox and Morrell. He was also engaged in collieries with one Davies, under the firm of Cox and Davies.

Cox and Morrell were in advance to Cox and Davies.

Richard Cox having applied to his partners for a further advance, it was agreed they should advance a further sum upon his brother, John Cox, becoming security for the repayment of 3,000*l.*

John agreed, as surety for Richard, to execute a joint and several bond to James and John Morrell for 3,000*l.*, upon having a counter bond for the like sum from Cox and Davies to indemnify him.

A joint and several bond was executed by John but not by Richard; the counter bond was given by Cox and Davies, and further advances were made by the bank.

Some time after this, Richard ceased to be a partner in the bank.

The bankers were considered to have released the surety by neglecting to obtain the bond from the principal debtor Richard Cox.

(*h*) *Stone v. Compton*, 5 Bing. N. C. 142.

John Cox also joined with Richard in signing promissory notes to Cox and Morrell, each of which was expressed to be for value received, by a draft at three months' date, to enable Richard to meet some bills.

John signs as surety merely, and becomes liable upon the words of the notes on a contract, whereby Cox and Morrell were to advance the money upon three months' credit. But the advances of money were actually made, not by drafts at three months, but directly in cash within that time, and in such a way as to give the bankers, upon each advance, an immediate demand against the principal debtor. Thus, the right of the creditor was rendered materially different as against the principal from what it was intended to be by the surety.

Therefore in this case also they released the surety; and it made no difference that they voluntarily forbore to demand payment during the three months (i).

Another instance of a release of surety, *by the bankers' conduct*, is the following.

A surety joined with a customer in a joint and several promissory note for 500*l.*, payable to the bankers on demand with interest. This note was made about the 1st January, 1838, and handed to the bankers, but was not at that time entered in their books; and it was not until the 9th December, 1841, that the 500*l.* was placed to the credit of the customer's account; on that day it was so placed, but as of the date, 12th November, 1841, at which date the balance appearing against the customer was about 96*l.*

In 1843, the customer became insolvent, being indebted to the bankers in a sum exceeding 500*l.*

It appeared, that the contract was, that the promissory note should be deposited as a security for the amount due from the customer on the open account; it was kept among the securities of the bank in the first instance, but subsequently, as above stated, was entered in the books of the

(i) *Bonser v. Cox*, 4 Beav. 379; *S. C.*, 6 Beav. 110.

bank, and in the customer's pass book. Now, these latter proceedings evidently altered the position of the surety; they were not according to the contract, but an entire violation of it; instead of being liable for a floating balance merely, the surety was made at once liable for the whole 500*l*. This was a release of the surety (*k*).

The following is a case, in which the steps, taken by the bankers, were considered *not to have released* the surety.

A. and B. enter into a joint and several bond to guarantee a banking company, which bond, reciting that B. had requested the company to accept and discount notes, drafts and bills of exchange for him, and also to lend and advance to him such sums of money as he might require to carry on his business, and also to keep a cash and running account with him, declared the condition to be, that if either A. or B. should pay to the company such sums as should become due in these respects, the bond was to be void.

Some time after the execution of the bond, the company by deed, "remised, released and for ever discharged the customer, B., of and from all manner of action, causes of action, suits, debts, dues, sum and sums of money, claims and demands whatsoever, at law and in equity," with a proviso "that nothing in the deed contained should prevent the company from suing or prosecuting any person who is jointly or severally bound with B. in any bond," &c., and stating it to be understood and agreed that the deed should not operate or be pleaded in bar, or as a release.

This deed was executed without the knowledge or consent of A., the surety.

Nevertheless, the deed was held not to operate to discharge A.; to operate not as a release, but merely as a covenant not to sue B., the customer; and that A. was liable, in regard to breaches, accruing before the execution of the deed (*l*).

(*k*) *Archer v. Hudson*, 7 Beav. 551, 564; affirmed on appeal, 15 L. J., Chanc. 211.

(*l*) *Price v. Barker*, 4 El. & Bl. 760.

Again, an arrangement with the customer, by which the bankers intend to secure themselves, may, if unknown to or withheld from the knowledge of the guarantor, frequently defeat the object of the guarantie altogether. Thus, if a banking company agrees upon receiving the guarantie of a particular person, they will advance a certain sum for the purpose of securing to the creditors of a trader a composition of ten shillings in the pound, and of enabling the trader to carry on his business, and at the same time, being themselves creditors of the trader, enter into a secret arrangement with him and others, purporting to secure to themselves repayment of the difference between the composition and the full amount of his debt to them, this is a fraud upon the guarantor and upon the creditors who execute the composition deed releasing the trader on the faith of the ostensible agreement, and the guarantie will be set aside in equity.

And, although there might be no *fraudulent* concealment of the arrangement between the bank and the customer, yet, on grounds of public policy, the banker would be prevented from retaining his security, in addition to the amount of the composition, upon the customer's original debt to him (*m*).

Bankers, in taking guaranties, ought to be careful to observe the principle which has been laid down by the House of Lords, which is this—although a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so, when the dealings between the parties are such as to lead to suspicion of fraud (*n*).

It does not, however, follow from anything said above, that in no circumstances can a banker give time to a principal in case of a guarantie from a third party; on the contrary, it is a general rule that a creditor may give time to a principal debtor, without prejudicing his right against the surety, provided he expressly reserves such right; circum-

(*m*) *Cullingworth v. Lloyd*, 2 Beav. 385.

(*n*) *Owen v. Homan*, 4 H. L. Cas. 997, 1034.

stances, however, may prevent that rule from having effect (*n*), and hence it is always perilous, though, perhaps, not unusual, for bankers to indulge a customer, in such circumstances, with a little delay; it ought never to be done without first ascertaining that the circumstances are such as to make it a safe course to adopt, without endangering their claims upon the surety.

Compositions with Creditors.—Compositions with creditors frequently give occasion to consider, whether bankers, by becoming parties to deeds of composition, may not release the guarantors from the payment of advances made by them to their debtors. The following case is an illustration of this:—

A. executes a deed to a joint stock banking copartnership, by which he covenants to guarantee the bank from all loss or damage that might arise, &c. to them on the account of a firm of B. & Co. with them.

When the bank sues A. on his covenant, he pleads that one H., being a member, partner and shareholder in the banking copartnership, and being also duly authorized by the banking copartnership, had, after the debt had become due to them from B. & Co., for himself and for the copartnership, executed the composition deed, acquitting B. & Co. from all actions, claims and demands which he, H., and the banking copartnership had or might have by reason of the debt due to the banking copartnership, and that the deed was made with the privity and consent of A., and therefore he was discharged of all liability on the guarantie; but it appeared that H. executed the deed in his own name only, and that, at the time of his execution of it, there was a separate debt due from B. to him, which accounted for his execution of it, and that the banking company never having themselves executed or authorized any one to execute for them the deed of composition and release, had not acquitted the principal, B. & Co., of the

(*n*) *Owen v. Homan*, 4 H. L. Cas. 997, 1034.

debt, and, consequently, had retained their rights against the guarantor, and were entitled to recover upon his covenant (o).

Now, here, if H. had been a member of an ordinary banking partnership, and there had been no separate debt due from B. to him, it would have been different, because one member of a common law partnership may release a debt due to the partnership (p), and by so doing bar his copartners from recovering it, and in such a case the guarantor, under the circumstances alleged, viz., that the release was made with his privity and assent, would have been absolved: but, perhaps, if there had been a separate debt, the release by H., even in the case of an ordinary partnership, would have imported a release of that debt only (p).

In the ensuing case a guarantie was given *by deed* to the banking company, under somewhat similar circumstances.

A. becomes surety, by a deed of guarantie, to the banking company called the "Commercial Bank of England," for the repayment, to the amount of 500*l.*, of advances made, and to be made, by the company, to B. Some time afterwards B. assigns, by deed, all his property, in trust for the benefit of his creditors, the banking company being parties to the deed, which contained a covenant by the creditors not to sue B. for any debts owing by him to them, subject to a proviso, that any creditor having any specific lien or security for his demand, might execute the deed without prejudice to the same security.

A. was afterwards called upon by the bank to pay on his guarantie the 500*l.* with interest, which he paid, and afterwards brought an action against B. to recover back the money, as being paid to his use.

Now, A. had executed the deed of assignment, B. being separately indebted to him, and the fact of his having done so was held to be evidence of his assent to the reserve of remedies contained in the proviso. Therefore, the abstract

(o) *Bain v. Cooper*, 9 M. & W. 701.

(p) *Ruddock's case*, 6 Rep. 25. See *per* Lord Abinger, C. B., 9 M. & W. 707.

question in the case was, " what is the effect of a discharge with a reserve of remedies consented to by the surety ?" It was considered, as settled, that a reserve of remedies, without such consent, prevents the discharge of a surety, which would otherwise be the result of a composition with, or giving time to, a debtor by a binding instrument. Then, that such consent has not the effect of discharging the surety as to the creditor, was considered to be clear; indeed, it was said to afford an additional reason against the discharge (*q*).

The following is another case arising upon an arrangement with creditors :—

A customer, as a security for advances made him by his bankers, indorses to them promissory notes made by B. Before the notes are due A. stops payment, and a deed was executed by him and several of his creditors, among whom were the bankers, whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed not to call for or compel payment of their respective debts due from him for three years. After the execution of this deed, and whilst the notes were still running, B. assented, in writing, to the creditors executing the deed and giving time to A., without prejudice to their claims on B. This had the effect of reviving the liability of B. in favour of the bankers and the other creditors, although the assent of B. was given after the execution of the deed, which had taken place, in the first instance, without the privity of B.; for it was sufficient that the assent to the forbearance should be given at any time before the notes became due (*r*).

A recent case may here be appropriately referred to, where a bank sought to secure an additional advantage by a secret understanding with their debtor, in acceding to a composition with his other creditors.

At a meeting of creditors a statement was made on the behalf of the debtor, that his bankers, who were secured

(*q*) *Kearsley v. Cole*, 16 M. & W. 128.

(*r*) *Smith v. Winter*, 4 M. & W. 454.

creditors, had agreed to accept a composition of six shillings in the pound upon the balance of their claim, after deducting the value of the securities in their hands. This statement was uncontradicted by the agent of the bankers, who was present, and upon the faith of it the unsecured creditors executed a letter of licence to the debtor, whereby they extended the time for the payment of their debts. On the day previously to the meeting of the creditors, however, a private arrangement had been made between the debtor's solicitor and the agent of the bankers, for payment of a larger composition, viz.—of ten shillings in the pound. The bankers having received the six shillings in the pound, and bankruptcy having intervened: it was held, by the commissioner in bankruptcy, that the bankers must be considered to have assented to the arrangement for payment of the six shillings in the pound, and that they could not prove against the estate in competition with the other creditors of the debtor (s).

At law, when a customer and another person as his surety sign a joint and several promissory note, payable to the bankers, to secure them, &c., and they afterwards execute a composition deed, whereby, in consideration of four shillings in the pound, the bankers and other creditors released the customer from the payment of the debts respectively set opposite their names, and the amount of the promissory note was set opposite the bankers' names; the deed also containing an express clause that it should not operate to invalidate, prejudice or affect any bonds, bills, notes or other securities, joint or several, &c., as to the claim against any such surety, the deed was clearly held not to release the surety, there being no fraud on the other creditors, since, the clause appearing on the face of the deed, all who executed the deed must be taken to be aware of, and agree to, the reservation of the rights against sureties (t).

(s) *In re Hoile*, 12 W. R. 1087.—Holroyd, Com.

(t) *North v. Wakefield*, 13 Q. B. 536.

Cases of composition with creditors frequently occur in which the interests of bankers, upon guaranties, are deeply concerned, and the form in which such guaranties are expressed ought always to be such that the bankers should be secured of a priority of repayments of advances over the creditors under the composition deed. For this purpose it is necessary that the guarantie should not be made conditional to repay, on failure of the traders to repay, but absolute. An illustration will be found in the following case, in which the bankers sued the trustees, under the composition deed, to recover the amount of their advances.

Carr and Co., being insolvent, compounded with their creditors by agreeing to pay them a composition of seven shillings and sixpence in the pound, at three instalments, and execute a conveyance of their real and personal estate to certain trustees, in trust to permit them, C. and Co., to carry on the business, subject to the control of the trustees, and to pay thereout to the creditors the three instalments; and, in case of full payment, to reconvey and reassign the estate to C. and Co.; but upon default of such payment then in trust to sell, and, after deducting out of the proceeds interest, costs and amount of mortgages, to divide the remainder amongst themselves and the other creditors.

C. and Co. continued, accordingly, to carry on the business, and opened an account with a banking company, from whom they obtained large advances. The bank applied to, and obtained from, the trustees the following guarantie :—

“ C. and Co., having assigned over all their real and personal estate to us in trust for securing a composition of seven shillings and sixpence in the pound to their several creditors executing such deed, and it being necessary to open a banking account for the purpose of carrying on the said trade, in order that the stock and goods on hand may be wrought up and converted into money, for the purpose of paying such dividends; and you having, at our request, consented to open a banking account, on the credit of the

names of C. and Co., or of any person or persons for the time being carrying on that concern : we do hereby promise and engage that any sum or sums of money to become due to you or to the said banking company, in respect of such account, shall, in the first instance, be paid to you out of the net proceeds of the trust estate, so far as the same will extend to pay."

Further advances were made by the bank to C. and Co. subsequently to this guarantie.

The trustees subsequently sold the property of C. and Co., under the provisions of the composition deed, and the proceeds were insufficient to pay the creditors the composition of seven shillings and sixpence in the pound.

Held, that the meaning of the guarantie was not that the trustees should be liable to the bank only out of the proceeds realized from the estate of C. and Co. *after* payment of the composition of seven shillings and sixpence to the creditors, but that they were liable, in the first instance, to repay, out of the proceeds, the whole amount of the advances made by the bank to C. and Co., as well before as after the guarantie, and the guarantie was held to extend to advances made before it was given, notwithstanding the objection was pressed upon the Court, that the recital, stating it to have become necessary to *open* an account, &c., pointed only to future advances (*u*).

Bankruptcy.—Where bankers, with knowledge of an act of bankruptcy committed by their customer, took a guarantie from a surety, to secure, to the extent of 50*l.*, all sums then or thereafter to become due from the customer, the surety having no notice of the act of bankruptcy, and the surety afterwards paid to them the full sum for which he was guarantor, without specifying whether it was to be applied to a certain portion of the bankers' claim (which was held not to be proveable under the *fiat*), or to the

(*u*) *Wilson v. Craven*, 8 M. & W. 584, 595.

other portion, which was proveable, the Court considered that this payment ought to go in reduction of that part which was proveable. For want of notice of the act of bankruptcy, which consisted in making over all the customer's property to the bankers by means of a bill of sale, the surety was considered not to be, either when the guarantie was given or when payment was made upon it, on equal terms with the bankers: and, therefore, if the payment was held to be applicable to that portion of the bankers' claim which arose after the act of bankruptcy, so that the payment could not be made the subject of proof against the bankrupt's estate, justice would not be done as between the bankers and the guarantor, and the payment was held to be applicable to the discharge of a part of the claim which was proveable against the estate, viz., to the part of it which was incurred previously to the act of bankruptcy (*x*).

Trusts.—There are cases in which a trust prevails over a security given to a banker, so as to oust the banker of remedy upon the security, although the banker had no knowledge of the trust.

Thus, if an executor and trustee, under a will, lends a sum of money, of which he is trustee, to a third party, on the promissory note of that party, made payable to the executor only, and afterwards, becoming embarrassed, indorses the note to his banker (who is also the banker of the maker of the promissory note), as security for advances, the banker having no knowledge of the trust, then, as the banker acquires only an equitable title to the note, and therefore no better title to it, or to the money secured by it, than the executor could confer, consequently he acquires no title at all, as against the persons for whom the executor was trustee (*y*).

(*x*) *Ex parte Sharp*, 3 M. D. & De G. 490, 504, where the Vice-Chancellor seems to have considered the facts to amount to a fraudulent concealment by the bankers.

(*y*) *Moore v. Jervis*, 2 Collyer, 60.

Also a right of set-off may override the banker's claim for security. Thus, if the above promissory note had been given by the maker, for money lent by the executor, in his own right, and the maker had afterwards become a creditor of the executor, for goods sold to him in his own right, the set-off of the maker must have taken precedence of the banker's claim upon the note (*y*).

In the first case, subject to the trust; in the second, to the set-off; the banker has a lien on the monies of the maker of the note, in his hands, which may be effectual, as far as it goes, to discharge the debt on the promissory note, which had been assigned to him (*y*).

A father and son gave a joint and several promissory note, to secure a balance due from the son to the bank. Soon afterwards, the son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties to the assignment, and to be named in a schedule, and the deed purported to contain an absolute release of the debts, without any reservation of rights against sureties. One of the trustees was a partner in the banking house, and the deed was executed by him and the other trustees, but not by any other creditor. It was also executed by the son, with the privity and concurrence of the father. The son was adjudicated a bankrupt, upon the execution of the deed, as an act of bankruptcy.

Held that, even assuming the father to have joined in the promissory note, as surety merely, and the partner in the bank to have executed the deed as creditor, and not merely as trustee, the father was not released, there being no reason to think, but every consideration pointing the other way, that any one intended or anticipated the partner's execution of the deed having that effect.

It was also recognized, as a general rule, that a surety who has concurred in or ratified an arrangement between

(*y*) *Moore v. Jervis*, 2 Collyer, 60.

the creditor and the principal debtor, cannot claim to be discharged by the effect of that arrangement, though, in some cases, it may be necessary that a reservation of rights, against the surety, should appear on the face of the composition deed (z).

Consideration for Guaranties previously to 1856.—Another principal point to be observed, with regard to guaranties (*not made under seal and delivered as deeds*), is, that a good consideration must appear on the face of the guarantie, or must be capable of being discovered, from the words construed, *where they are ambiguous* (a), by the aid of the circumstances in which the guarantie was given, if given before July 29, 1856; otherwise the bankers cannot take advantage of it.

The following instances may serve to throw light on this head, as regards guaranties given before the 19 & 20 Vict. c. 97, s. 3.

“We, the undersigned, hereby indemnify the National Provincial Banking Company, to the extent of 1,000*l.*, advanced or to be advanced to A. B., by the company; but the indemnity to cease when A. B. shall have paid in the sum of 1,000*l.*, to the credit of his account,”—was a form of, what was intended to be, the guarantie of a customer’s account.

At the date of this instrument, A. B. had overdrawn to the amount of 1,400*l.* Now, but for this fact, the words “advanced or to be advanced,” might have fairly admitted of the construction, that future, as well as past advances, were in the intention of the parties; the document, however, does not, on the face of it, show that any one contemplated a security for future advances, to the extent of 1,000*l.*; it binds the sureties to pay 1,000*l.*, part of 1,400*l.*

(z) *Ex parte Harvey*, 4 De G., Mac. & G. 881. A guarantie may be so framed that the release of the principal shall not be a release of the surety. *Cowper v. Smith*, 4 M. & W. 519.

(a) See *per Parke, B.*, 1 Exch. 158; and Lord Campbell, C. J., 20 L. J., Q. B. 9.

already advanced; it does not, on the face of it, import that it is to attach upon future advances; future advances are not necessary to make it attach; the full amount of it is absorbed in the debt already due. The guarantors, probably, did not know how the account stood at the time. If less than 1,000*l.* had been due at that time, the guarantie might have admitted of the construction, that it impliedly contemplated future advances, inasmuch as it could not otherwise operate to the full extent intended; but when it appears that, at the time of giving the guarantie, more than 1,000*l.* has been already advanced—an existing debt to which the guarantie can be at once applied—the meaning of the guarantie is—to guarantie the existing debt of A. B., whether future advances are made or not (*b*).

With reference to somewhat similar circumstances, the decision was different, turning, as questions respecting guaranties are apt to turn, on points, which seem at first sight to involve mere subtleties; on a closer inspection there will, however, mostly be discovered substantial variations.

On the 7th of August, 1838, two persons signed a parol agreement in the following terms by way of guarantie to A. and B., bankers in partnership.

“In consideration of advances made and to be made by A. and B., bankers, or by any other persons of whom their firm may from time to time consist, in the way of loan, payments, discount or otherwise, to G. F., we jointly and severally hereby guarantee A. and B. the repayment of the said advances, and indemnify them against any loss by reason of such advances; our liability not to exceed the sum of 1,000*l.* This guarantie to be a continuing guarantie and to be a security to A. and B. to the extent of 1,000*l.*, as aforesaid, for the whole of any balance which may from time to time or at any time become due to

(*b*) *Bell v. Welch*, 9 C. B. 154.

A. and B., or to the persons for the time being constituting the firm of the said banking-house."

At the date of the guarantie, G. F., who was an old customer of the bank, owed them a balance of 1,685*l.* 10*s.* 10*d.*; after that date various other sums were avanced to him.

Held, that the guarantie disclosed a sufficient consideration to pay as well past as future advances; some advances having in fact been made subsequently to the date of the guarantie, and the circumstance of the bankers not binding themselves by the terms of the instrument to make advances, being of no consequence, since the advances actually were made in pursuance of the instrument (c).

The following was the form of the guarantie in another case, which also occurred before the alteration of the law by 19 & 20 Vict. c. 97, s. 3.

"We hereby become bound to guarantee to you as cashier, and as acting for behoof of the Aberdeen Banking Company, all current obligations and engagements in your hands, to which J. S. may be a party, and also all his future obligations and engagements that may come into your hands, as cashier aforesaid, or into the hands of your successors in office, in the course of business. This guarantie, however, to be limited to the sum of 1,000*l.*; such to be a standing guarantie, and in force until recalled by us."

This was sent in the form of a letter, addressed to the cashier of the Aberdeen Banking Company, and signed by a trading firm.

On the faith of this instrument, the bank discounted for J. S. several bills of exchange, to the amount of 998*l.* 10*s.* 5*d.*, all which bills were dishonoured, and no part of the amount paid to the bank, with the exception of 50*l.*; so, on the whole, the balance on this account against J. S. was 948*l.* 10*s.* 5*d.*

(c) *Chapman v. Sutton*, 2 C. B. 634. "In consideration of giving credit," held sufficiently to show past as well as future credit to be meant. *Edwards v. Jevons*, 8 C. B. 437; *Broom v. Batchelor*, 1 H. & N. 255; 25 L. J. Exch. 299.

J. S. had a banking account with the bank, wholly distinct from the former account, which was confined to discount transactions; and at the time when a *fiat* of bankruptcy issued against the guarantor's firm, the banking account showed a balance of 166*l.* in favour of J. S.

The bank was held entitled to prove for the difference between the two accounts, it being considered that the mention of the future obligations and engagements implied a consideration (*d*).

The above is the law, with respect to guaranties given previously to the 29th of July, 1856; such guaranties, unless made under seal and delivered as deeds, must contain the consideration expressed on the face of them, &c., as above laid down, in order to be valid and effectual.

With respect to instruments of this kind since that date, the law has been altered; and it now is not necessary that any statement of the consideration should appear in such undertakings by simple contract any more than in deeds, provided such undertakings be "in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized" (*e*).

Promissory Notes as Guaranties.—A guarantie is sometimes given in the form of a promissory note signed by the guarantor; but in such case the instrument will often be found to operate as an agreement, and must consequently be stamped accordingly, in order to be made effectual.

Thus, if two persons, as guarantors or sureties for a customer of a bank, sign along with the customer an instrument in such form as the following:—

*"We jointly and severally promise to pay the sum of 100*l.* to the Lincoln and Lindsey Banking Company, or their order, on demand, with interest."*

And on the back of the document there is this indorsement, signed by the same parties:—

(*d*) *Ex parte Littlejohn*, 3 M. D. & De G. 182.

(*e*) 19 & 20 Vict. c. 97, s. 3.

*“ The within note is given for securing floating advances from the said banking company to the customer, with interest from the respective times when such advances have been or may be made, together with commission, stamps, postages, and all usual charges and disbursements, not exceeding, in the whole, at any one time, the sum of 100*l*. ”*

Then, in an action by the bank, against one of the two sureties on the note, to which there was a plea of the Statute of Limitations; and payments were shown to have been made by the customer, in reduction of the balance due on the banking account, within six years before action. Held, that, in order to point the payments to the note, it was essential to the plaintiff's case to take notice of the indorsement, in order to show the note to be a security for the floating balance (*f*), *for which purpose it was an agreement*, and required to be stamped.

C., being about to open an account with a banking company, gave them a promissory note, dated the 4th of December, 1855, whereby he and his surety jointly and severally promised to pay to the company on demand 200*l*. At the same time they signed and handed to the bank a memorandum that the note was given as a collateral security for the banking account intended to be kept by C., and that the bank should be at liberty at any time thereafter to recover from them, or each of them, up to the full amount thereof, every sum which C. should become indebted or liable to the company, for money paid or advanced by them to or for him; and in case of the bank suing on the note, its production should be conclusive evidence of the amount claimed by the bank from C., being due and owing by him. The banking account was accordingly opened with C., and on the 31st of December, 1855, he was indebted to the bank in 173*l*. No demand of payment was made, or balance struck, until the 30th of June, 1856, when the sum of 194*l*. was due from C. to the bank. A balance was afterwards struck every half-

(*f*) *Cholmeley v. Darley*, 14 M. & W. 344.

year, the bank from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the bank of 175*l*. In March, 1862, the bank brought an action against the surety on the note: and it was held, that the Statute of Limitations did not begin to run until the balance was struck and demanded by the bank (*g*).

If the security or guarantie taken be in the form of a joint and several promissory note, payable to the bankers on demand, and signed by the customer and the guarantor for a given sum; then, when the guarantor is sued on this note for the sum mentioned in it, to allege that he made the note as the surety, and for the accommodation of the customer, with the knowledge of the bankers, and that after the note became due, and payment had been demanded of the customer, the bankers being holders, without the consent or leave of the guarantor, agreed to give time to the customer, is wholly ineffectual as an answer to the action, there being no specific agreement on the part of the bankers to take the note from the guarantor as a surety only; and it was left a doubt whether, if there had been at the time of the making of the note such a specific agreement entered into, the surety would have been discharged by time given to the customer (*h*).

Probably it is not unusual, and it is prudent, for bankers, on taking a note of this kind, to point out to the surety that though he signs only as surety, he will be treated in all respects as a principal, if need be; and in no case ought they to receive such a note or agree to receive it from him as surety, lest it should be held, that in such case he was discharged, by reason of time being given to the customer.

It is not uncommon for joint-stock banks to take a joint

(*g*) *Hartland v. Jukes*, 1 H. & C. 667.

(*h*) *Munley v. Boycott*, 2 El. & Bl. 46.

and several promissory note, signed by the customer and other parties, the latter of whom are intended to be sureties for the former, in order to secure any balance that may become due to the bank on his account with them, or to secure advances made by them to him.

Now, in the first place, it is very material that the persons having the management of the business or of the accounts of the bank should be satisfied that there is nothing in their deed of settlement to prohibit any arrangement of this nature. Many deeds of settlement contain stringent provisions to prevent the funds of the company being advanced or risked upon merely personal security.

To secure an advance of 1,000*l.* from a banking co-partnership, made to a person who was not at the time a customer of that concern, but who wanted the money for the purpose of paying off a debt owing to another banking co-partnership, of which he had been a customer, the banking company first mentioned agreed to advance, upon several other persons joining him in a bond, which was entered into accordingly, and the money advanced; and the borrower opened an account and became a customer of the banking company.

It cannot be held, in such case, to be invariably the rule that all payments made subsequently to giving the bond by the borrower to the bank, are to be applied in immediate and final liquidation of the 1,000*l.*; or that if the borrower, after the giving of the bond, on a long course of transactions, be for a time in advance to the bank, the bond is thereby satisfied.

It may be, in default of express stipulation, to be inferred from the conduct and language of the parties after the execution of the bond, that the intention was for the bond to stand as a continuing security, in which case the rule of application of payments would not apply (*i*).

The bond was considered to have been given to secure

(*i*) *Henniker v. Wigg*, 4 Q. B. 792.

the banking company from advances which they might make *from time to time*, and consequently had not been discharged.

In truth, such a bond ought never to leave it a question, on the terms of it, with what intention it was given. Trustees or others interested for banking co-partnerships, ought, therefore, to be careful in ascertaining that the bond has words expressing the meaning of the parties, both by positive and negative clauses.

A., being a customer of a bank, prevails upon B. to join him in a promissory note for 150*l.* to secure his balance; this he sends to the bank, with a letter, stating that he had got B. to join with him in the note. The note is never entered in the books of the bank to A.'s debit. When it became due there was a balance against A., but within a few days afterwards there was a balance of 250*l.* in his favour. On these facts it was contended, in an action against B. by the bank, that the note must be taken to have been paid, or that, as B. had signed only as surety, and without consideration for making the note, and as the bank had accepted the note on that understanding and knowledge, and had given time to A., the principal, without B.'s knowledge, therefore B. was discharged.

But it was held, that the facts did not support either of these defences, for that where two persons give a joint and several promissory note for the debt of one, it is necessary, in order to give the other the rights of a surety, as against the creditor, to show that he was only a surety; that the creditor knew it, and accepted him as such; and that mere inactivity, forbearance or lying by, does not amount to giving time, and that refraining from appropriating the balance of A.'s account, in payment of the note, did not discharge B. from his liability (*k*).

The note was never entered to the debit of A., and the bankers were not bound to pay it; although if the pay-

(*k*) *Strong v. Foster*, 25 L. J., C. P. 106, 110; 17 C. B. 201.

ment had been made to the principal it would have availed for the benefit of the surety; and it has been said that it would entirely alter the position of bankers if it were to be considered that, because, after they take a joint and several promissory note, they have a balance in their hands belonging to one of the parties to the note, the other should be discharged if he turned out to be a surety (*k*).

A joint and several promissory note is made to a banker, by a customer and his surety, to secure advances made by the banker. The customer afterwards pays into the bank generally sums exceeding the amount of the advances, but also draws out to a still larger amount, and becomes bankrupt. In such case the surety is liable, for he cannot insist that the payments should be appropriated in discharge of the sum secured by the note (*l*).

A. and B., being partners, got permission from their bankers to overdraw their account, on B. giving to the bankers his promissory note for 2,000*l.*, as a security, A. giving to B. his (A.'s) promissory note for 1,000*l.*, being half the liability incurred. B. indorses this note, and pays into *his* account with the bankers, who were, in fact, ignorant of the circumstances under which he took the note. When the account was overdrawn by 1,300*l.*, and after the termination of the partnership of A. and B., the bankers sued A. on the promissory note for 1,000*l.*, and it was held that they were entitled to do so; for although the effect would be, in the first instance, to cause A. to pay to them more than one moiety of the 1,300*l.*, yet it was observed that he might call upon B. to pay back his proportion. It would have been the same in all respects, apparently, if the bank had known of the circumstances in which the promissory note was given to B. (*m*).

Joint and several Covenant.—If a joint and several covenant is entered into by a principal and his surety, that the

(*k*) *Strong v. Foster*, 25 L. J., C. P. 106, 110; 17 C. B. 201.

(*l*) *Ex parte Whitworth*, 2 M. D. & De G. 164.

(*m*) *Heywood v. Watson*, 4 Bing. 496.

principal shall repay a sum advanced, by three instalments, with interest, on three specified days, and one instalment is duly paid; but before the second is paid the surety becomes bankrupt: the creditor may prove against the bankrupt's estate in respect of the amount of the two unpaid instalments, and interest, as upon a contingent liability, under 12 & 13 Vict. c. 106, s. 178 (*n*).

Good Conduct of Clerks.—With respect to guaranties for the good conduct of clerks of bankers, a point which has already been adverted to, namely, whether the guarantie that is taken is in such a shape as to stand good, in case of a change in the members of the banking house, arises more frequently in cases of guaranties for the fidelity of clerks than in those of guaranties for the repayment of advances to customers, and therefore requires to be more fully developed.

In considering this subject the Courts are chiefly guided by the intention of the parties. This is mostly discoverable only from the expressions they have used in the instrument of guarantie. In other words, it is most important, for the security of bankers, that the language used should clearly and undeniably demonstrate the intention that the guarantor, whether he undertakes for the good conduct of the clerk during a limited or undefined period of time, should be bound to the *banking house*, not to the persons who may be members of the establishment, at the date of the guarantie; because, in case the guarantor is only bound, in the latter way, upon any change in the partnership, by death, by retirement or by taking in fresh partners, the new partnership *might* find themselves unable to enforce the obligation.

The following is an illustration of what has just been said, as to the effect of a change of partnership.

A guarantor executes a bond, whereby he undertakes to

(*n*) *Ex parte Barwis*, 25 L. J., Bank. 10; *Ex parte Willis*, 4 Exch. 530.

A. for the fidelity of a clerk, so long as he should continue in A.'s service as clerk. A. takes a partner, and brings an action on the bond, and assigns, as a breach, that the clerk had received money on account of the partnership, and had not paid it over to the partners; but A. was not permitted to recover, the Court saying that when A. took a partner there was an end of the obligation; that the condition was confined to A. alone, and the breach assigned was not within the condition, and there was nothing to show the guarantor to have intended to be bound, for the clerk's fidelity, to any other person than A. (*o*).

This decision, it is true, has been questioned by some judges (*p*); but the principles on which it is founded do not appear, either expressly or impliedly, to have been decided to be inapplicable to cases where the facts were tantamount, and the terms of the guarantie equivalent (*q*).

In connexion with this class of cases may be here mentioned one which, though it can in general only be applicable in instances where a banking-house is conducted by a single person, without partners.

If a bond be taken that a clerk shall serve faithfully, and account for all money, bills, notes, &c., which he shall receive, &c., to the banker and his executors, administrators and assigns, it does not make the surety liable for money, &c., received by the clerk in the service of the executors, &c., who continue the business and retain him in the same employment (*r*). This case turned upon the intention which was held to be to guarantee the service to the tes-

(*o*) *Wright v. Russell*, 3 Wils. 530; 2 W. Bl. 934.

(*p*) In *Barclay v. Lucas*, 3 Dougl. 321; 1 T. R. 291, n. But *Barclay v. Lucas* has not escaped without much question; see the note at the end of the report in 3 Dougl. 321. However, *Chapman v. Beckinton*, 3 Q. B. 722, recognizes the principle of it, and the same seems to be the ground of decision in *Metcalf v. Bruin*, 12 East, 400, and *Wilson v. Craven*, 8 M. & W. 584; viz., that the *bank* was the same all along.

(*q*) *Dry v. Davey*, 10 A. & E. 30.

(*r*) *Barker v. Parker*, 1 T. R. 287; but compare *per* Lord Ellenborough, C. J., *Strange v. Lee*, 3 East, 490. Lord Mansfield, C. J., 1 T. R. 295, distinguishes *Barclay v. Lucas*, by observing that there the same trade was carried on, by the original masters, in the same manner, and the only difference was, the introduction of a new partner.

tator and no longer, and must be considered with reference to the statutory enactment (passed since its date) mentioned above (s).

In a case where a bond was given to guarantee to a company not incorporated the faithful services of a clerk, and the bond was made to and with trustees on behalf of the body: the Court held, construing the instrument with regard to the obvious intention of the parties, that it might be sued upon by the trustees at any time during the continuance in the service of the actual body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares, either by death or transfer (t).

So where a joint-stock banking company had been established under the 7 Geo. IV. c. 46, and a guarantee was given it, and then, upon a considerable accession of proprietors and capital, and an increase in the number of directors, the company took another name, it not being shown to differ in its constitution from the former bank, the bank remaining the same, though with a different name: it was held, that its public officer might sue and recover upon the guarantee given to the former establishment (u).

Another point to be considered is, that a guarantee for the faithful services of a clerk, given at a time when his employment comprises a certain routine of duties, will not extend to cover other or additional duties that may be imposed on or accepted by him; thus if a clerk to a bank, for whose good conduct *as clerk* a guarantee has been given, is made manager, and it be shown conclusively that he ceased to be clerk when he became manager, so that no breach of the bond could have happened after he became manager, that will be an answer to an action by the bankers on the bond against the surety, founded on mis-

(s) See *supra*, p. 215.

(t) *Metcalfe v. Bruin*, 12 East, 400.

(u) *Wilson v. Craven*, 8 M. & W. 584.

conduct as manager (*x*) ; at least this would, in all probability be ruled in any case where the guarantie did not expressly engage for his performance of his duties as clerk, or in any other capacity (*x*).

It is scarcely necessary to observe that the conduct, which amounts to a default on the part of the clerk, and which renders the surety liable upon his undertaking, must be some act or omission, some malfeasance or nonfeasance, within the scope of the duties appertaining to the situation he fills.

A clerk of a provincial bank (in Devonshire), who was sent by the manager, at the request of a customer, to his residence, about eleven miles from the bank, in order to receive a large sum of money, to be placed to the customer's account with the bank, and who, casually, on his way back, lost the money out of his pocket, was held to have received the money in the course of his employment as clerk, and although the jury found it not to be the custom of bankers in that part of the country, to send for their customer's money as above stated, a surety, who had guaranteed the bank that the clerk "should well and faithfully serve them as a clerk, and should not cancel, obliterate, spoil, destroy, waste, embezzle, spend, or make away with any of the books, papers, writings, stamps, cash, bills of exchange, promissory notes or other property of the bank, or of any of the customers, which should be deposited in his hands, or intrusted to his custody or possession, or come to his care, custody or possession," was held to be responsible to the extent of the monies lost (*y*).

The same would be the decision in case of the payment of a cheque, or the receipt of money, *after banking hours*, or of sending the clerk to London on a sudden emergency, to obtain funds, or the like (*z*).

The fact of a clerk having received into his personal

(*x*) *Anderson v. Thornton*, 3 Q. B. 271.

(*y*) *Melville v. Doidge*, 6 C. B. 450.

(*z*) See 6 C. B. 454.

possession a sum of money, and having lost it, is strong evidence of negligence; but it would have been an answer to the action above referred to, to have shown that the loss had been occasioned by robbery before the clerk could have got back to the bank, and without his default (a).

Evidence.—In cases of guaranties or securities of any kind, taken for the good behaviour of clerks, it is material to bear in mind that whatever is evidence available against the principal, is available against the surety.

Thus, where bankers sued the obligor of a bond given for the fidelity of a clerk, entries of receipts of money by the clerk in the books kept by him in discharge of his duty as clerk to them were held to be, after his death, evidence against the surety of the fact of his having received the monies therein mentioned (b), it being part of his guaranteed duty to keep those books.

The reason for taking such security is not only the obvious one, that, in case of any embezzlement by the clerk, the banker may have the means of protecting himself against the loss thereby caused, but also that he may have the same protection, in case of any loss arising from the merely careless or thoughtless inattention to his duty, of the clerk, in which case, without such security, the loss must ultimately fall on the banker, assuming the clerk to be unable to make it good (c).

But where a fraudulent scheme has been concocted between a customer of the bankers and their servant, the object of which is to impose upon them, and in pursuance of this scheme a cheque has been drawn by A., payable to the customer or bearer, and by the customer indorsed to the bankers, and by their servant carried to the customer's credit, in order to cause the bankers to think that

(a) See *Walker v. British Guarantee Association*, 21 L. J., Q. B. 257; 18 Q. B. 277.

(b) *Whitnash v. George*, 8 B. & C. 556.

(c) *Rogers v. Kelly*, 2 Camp. 123.

that account was not overdrawn on a given day, with the understanding that after that day the cheque should be returned to the customer; there no loss will be suffered by the bankers, but they may sue the maker of the cheque upon it, though he was not shown to have been acquainted with this arrangement, the bankers themselves being no way privy to it (*d*).

Embezzlement.—In a case where a clerk to a bank misappropriated funds that came to his hands as clerk, and died before the fraud was discovered, without a will, leaving considerable personalty, which was placed by his widow in the custody of the bankers, and she took out letters of administration, and commenced proceedings against them to recover the property: it was held to be no answer to a bill, filed by them for an injunction and administration of the estate, to say that the bill alleging a felony, no civil remedy lay in respect thereof (*e*).

If a clerk commits an embezzlement on the bank, and his father, in order to cover his defalcations, transfers stock into the name of the banker, this is a composition of a felony to prevent a prosecution, and it seems that the value of the stock cannot be recovered, nor will the stock be ordered to be retransferred (*f*). But where a clerk in a banking company embezzled a large sum of money of his employers, and before his conviction he deposited the deeds of some real estates with the company, and directed a transfer of certain policies of assurance on his life to be made to the company as a security, so far as they would extend, for the money taken, and the company afterwards successfully prosecuted him for the embezzlement to conviction: it was held, that the money taken was a debt due from the felon to the company, and a good consideration

(*d*) *Bosanquet v. Corser*, 8 M. & W. 142.

(*e*) *Wickham v. Gatrill*, 2 Sm. & G. 353; 23 L. J., Chanc. 783.

(*f*) *Claridge v. Hoare*, 14 Ves. 59.

for the securities given by him to the company, and the company was entitled to realize them (*g*).

A clerk of a banking copartnership, under 7 Geo. IV. c. 46, may be convicted of embezzling the monies of the company, though he is a shareholder, or partner, in such company (*h*).

Discharge of Guarantor.—The guarantor, for “the true and faithful discharge of the trusts which the bankers, his employers, might repose in A. B., acting as cashier, or superintending clerk, in their banking-house,” (which A. B., three years after the date of the guarantie, is found to have embezzled a sum of 1,292*l.* 8*s.* 6*d.*.) is not discharged by the circumstance of the bankers never having given actual notice of A. B.’s misconduct, either to the guarantor, or to other parties, who had also guaranteed A. B.’s conduct, until three years more had elapsed; at least, if it be shown that the guarantor knew of the fact from other sources, it not appearing that the bankers concealed it from him industriously.

Nor is the guarantor in such case discharged, though it appear that the bankers had given credit in their books for the above amount to A. B., entering it as a private loan, with a view to conceal the real state of the case from the other clerks, and so to preserve the credit of the house from suffering.

The facts were left to the jury, in an action by the bankers on the guarantie, to say, upon consideration of them, whether the bankers by so doing had waived the guarantie and exonerated the guarantor; and the jury found for them (*i*).

In case of a guarantie of this kind, the contract of a guarantor is not like that of the parties to a bill, who are only secondarily liable, and to whom notice must be given of the default of the party primarily liable, in order to

(*g*) *Chowne v. Baylis*, 31 L. J., Chanc. 757; 31 Beav. 351.

(*h*) *Reg. v. Atkinson*, Car. & M. 525.

(*i*) *Peel v. Tatlock*, 1 B. & P. 419.

charge them; for the guarantor's contract is not that he will make up any deficiency, if A. B. does not, but he is bound absolutely to pay for A. B.'s deficiency (*k*).

He is supposed by the law to have the money always ready to make up the deficiency, in cases where the guarantie is that the clerk shall, upon demand, from time to time pay to his employers what may be due; and the bankers are not bound to make a demand on the surety previously to issuing a writ against him; whilst he in such case, even when he allows judgment to go by default, can only recover from the clerk the amount of the debt, plus the costs of the writ, the residue of the costs of the proceedings against him he must pay himself (*l*).

On the other hand, as we have seen (*m*), any variance in the agreement to which the surety has subscribed, which is made without his knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety.

This is the rule; and it may be illustrated by the example following: where a surety guaranteed the faithful and honest conduct of a clerk, who was paid by salary, and his employers, some time afterwards, changed this part of their arrangement with him, and paid him by means of a commission, which amounted to more than his former salary: it was held, that the surety was discharged by reason of the alteration (*n*). So, where A. becomes guarantor of the good conduct of a clerk in a bank; the clerk is subsequently appointed to a better situation in a branch of the bank, and A. extends his guarantie to the conduct

(*k*) *Per* Heath, J., 1 B. & P. 422.

(*l*) *Pierce v. Williams*, 23 L. J., Exch. 322.

(*m*) *Supra*, p. 219.

(*n*) *North Western Railway Company v. Whinray*, 10 Exch. 77. When the condition of the bond did not contain any stipulation, that the same salary should be continued, either express or implied, the guarantor would not be discharged by a reduction of the salary. *Frank v. Edwards*, 8 Exch. 214; explained, 10 Exch. 81, 82.

in this new situation. The clerk afterwards undertakes, on having his salary raised, to become liable to one-fourth of the losses on discounts, and then allows a customer to overdraw, whereby the bank suffers loss. A. was held not to be liable for this loss to the bank, though it was within the terms of his original guarantie, because the fresh arrangement *made without his knowledge* was a discharge (o).

Change of Firm.—The following decision illustrates still further the position already stated, that, when from the terms of the guarantie, it can be seen that the intention was to secure the good conduct of the clerk, while serving the banking-house, whether the same persons who constituted the partnership remained in it or not, the obligation will be treated as a continuing one as regards the changes in the body.

The bond recited that *the plaintiffs* had agreed to take one Jones into their service, and employ as a clerk, in their shop and counting-house, &c., and that the guarantor had agreed to become security for his fidelity; and the condition was, that if Jones should faithfully account for, and pay to *the plaintiffs*, all sums of money, &c., in the service of *the plaintiffs*, and did not embezzle, &c., then the condition to be void.

The plaintiffs in the action were the members of the banking-house at the time that the bond was given, and to whom the guarantor was bound; but it appeared that, some time after that date, the plaintiffs had taken a fresh partner, and it was after this change in the partnership that the clerk's default took place. The breach assigned was, that, after the addition to the partnership, Jones continued in *their* service, and received a certain sum of money, *three quarters of which he received on account of the plaintiffs*, and did not pay over the same.

It is to be observed, that the concern appears to have

(o) *Bonar v. Macdonald*, 3 H. L. Cas. 226.

consisted originally of the three plaintiffs, the whole number of partners being four, after taking in the new one; hence the plaintiffs alleged, that three parts of the money received on account of the house belonged to them.

The Court held the intention of the parties to the guarantie to be a security to *the house*, so that no change of partners would discharge the guarantor (*p*); and it was observed that, in houses with many clerks, the inconvenience of demanding fresh security from each, upon every change of partners, would be enormous (*q*).

Liability of Executors of Guarantor.—A clerk, to secure his employers, &c., joins with two sureties in executing a joint and several bond to his employers. The period of the clerk's service was undetermined; but either party might determine it at his option; the bond was to extend over the period of his continuance in the service.

One of the sureties soon afterwards dies, and his executrix gives notice to the employers, that she should not consider herself liable on the bond.

His employers, in consequence, obtain from the clerk the bond of a fresh surety.

Then the surviving surety dies, and then the new surety; and lastly, the clerk, four years and a half after the first-mentioned death of the surety, himself dies; and deficiencies are thereupon discovered in his accounts, principally, in respect of sums received by him after the date of the bond of the fresh surety.

Under these circumstances the executrix was held to have no right to restrain the firm from suing her on the bond, the firm never having released her, as executrix, or given her any intimation that they did not consider her liable (*r*); for the rule of law is this—sureties of this description are not discharged from their obligations,

(*p*) *Barclay v. Lucas*, 1 T. R. 291, n.; 3 Dougl. 321.

(*q*) *M'Gahey v. Alston*, 1 M. & W. 389.

(*r*) *Gordon v. Calvert*, 2 Sim. 235; affirmed on appeal, 4 Russ. 581.

unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the surety (s), and it is the duty of the surety to see that the principal performs his obligations, &c. (s).

Bankers finding Sureties as Treasurers.—We may close the subject by advertng to the cases in which bankers may be required to find sureties, upon their appointment as treasurers, to public bodies.

A., B. & Co., enter into a joint and several bond, for the faithful performance by A., of his duties as treasurer of a poor law union, in receiving, &c., monies, &c. A. and another person were bankers, and A. had, in fact, never been in the exclusive receipt of the monies of the union, which were paid into the bank; the overseers of the parishes, constituting the union, having been directed, by the board of guardians, in their printed contribution warrants, "to pay to Messrs. Brodie & Co.," and the cheques, drawn by the board, requiring A. and his partner to pay, &c.

The Court held it to be an established principle, that for monies paid to two or more parties, the surety for one is not liable, and therefore, that if a person is surety for another, for the due accounting for monies received by him, the receipt of monies by that person, and his partner, is not the same as the receipt by him alone, because the surety may be willing to be accountable for one individual, but not for him and his partner, and a payment to one partner is a payment to both. Here the board drew cheques on the banking firm, treating them as their joint treasurers, and from that it was inferred that they agreed to the monies being paid into the bank, to their credit, just as any other customer. Hence, when the bank failed,

(s) *Creighton v. Rankin*, 7 Cl. & F. 325. The neglect of the bankers, in leaving in the hands of the clerk a larger sum than the surety had stipulated should be left, makes no difference. See *Lindsay v. Lord Downes*, 2 Ir. Eq. R. 307.

with a balance due to the union in its hands, the sureties of A. were held not to be liable, and a sum equal to the above balance having been paid to the board of guardians, by one of them, under a mistake of facts, was held to be recoverable back again (*t*).

If the guarantie had been for the good behaviour of the partners, and that they and the survivor and survivors of them should account for, &c., all monies paid to them, or either of them, or any person thereafter in partnership with them, &c., the retirement of one of the partners would have released the surety (*u*).

When the guardians of a poor law union took a bond, with sureties for the honest and faithful performance of his duties, by a banker appointed the treasurer of the union, one of which was, according to the regulations of the poor law board, to pay out of any monies of the guardians in his hands all orders drawn by them on him; and the guardians took the amount of several orders partly in money and partly in bank notes of the banker himself, and partly in a draft upon the banker's correspondents in London, and then the bank stopped payment, the guardians having the notes in their hands, having either never parted with them or holding them after being returned after the stoppage by persons to whom they had been paid away: it was held, that the sureties were not liable; for that the guardians had conclusively elected to treat the orders as paid, and the notes were taken at the peril of the guardians; as to the draft, it had been given for the convenience of the guardians; on the whole, therefore, the sureties were discharged (*x*).

As regards evidence, of the liability of the guarantor in these cases, we may point out—

1. That an account, delivered by his clerk, cashier, &c., charging himself, is evidence against the clerk's surety.

(*t*) *Mills v. Alderbury Union*, 3 Exch. 590.

(*u*) *University of Cambridge v. Baldwin*, 5 M. & W. 580.

(*x*) *Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884. In such case the guardians are left to prove against the estate of the bankrupt banker on the notes and draft. S. C.

2. That, in case *such* account is made out by the clerk, and he continues to receive payments, on account of the banker, and subsequently pays in monies, or takes credit for salary or disbursements, those payments, &c., are not necessarily to be first applied to extinguish the previous balance, *when* the subsequent receipts are equal to the payments, &c., in amount (y).

(y) *Lysaght v. Walker*, 5 Bli. N. S. 1.

CHAPTER XI.

APPROPRIATION OF PAYMENTS.

A QUESTION has very often arisen, where a customer has a running account with a bank, the balance of which is sometimes for him, and at other times against him, how are the payments by the bankers to be applied ?

Thus, in case of a banking partnership, where one partner dies, and the customer goes on dealing, as before, with the bank, there being no new account, nor any settlement made, and then the banking house becomes bankrupt, the account at the death of the partner being about 1,700*l.* in the customer's favour, but being, afterwards and before the bankruptcy, reduced, by payments made by the bankers, on his account, to about 450*l.* in his favour ; but again showing a balance for him exceeding the former amount of 1,700*l.*, at the time of the bankruptcy ;—are the payments made, subsequently to the partner's death, by the survivors, to be applied, in reduction of the balance due to the customer, at that period, so as to discharge the estate of the deceased partner *pro tanto*, or are they to be considered as exclusively parts of the dealings between the survivors and the customer ?

Now this question has been settled, once for all, by Sir W. Grant, M. R., in a decision which has been universally followed and acted upon, in this way.

The case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, gives no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first paid out : it is the first item, on the

debit side of the account, that is discharged, or reduced, by the first item, on the credit side.

Indeed, this is the principle on which all accounts current, and especially cash accounts, are settled; and any other mode (as the Master of the Rolls shows) would lead to extravagantly unreasonable results (*a*).

If the customer intended that this usual mode of dealing shall be altered or departed from in any way, it is incumbent on him to signify his intention to that effect to the bankers; but if he receives his account as drawn out, as one unbroken running account, and makes no objection to it, then, it being the usage in the banking trade, to consider silence, on receiving an account made out, to signify the customer's acquiescence, in the correctness of the account in all respects, he cannot afterwards raise any objections (*a*).

The case is strengthened if the customer draws cheques upon the bank, after the death, where there is no fund to answer those cheques, except the balance due to him at the time of the death; for that is treating such balance as the fund out of which his cheques, notwithstanding the death, were to be paid; and thus he furnishes distinct evidence, beyond the inference derivable from the nature of the dealings, and mode of keeping the account, that he gave express authority, that this balance was to be applied to the cashing of his cheques *in the order* in which they were presented (*a*).

There is no difference between the Courts of Law and the Courts of Equity on this question of appropriation; both adopt the same principle as the ground of their decisions (*b*); and the rule is carried into effect, even where it operates to the prejudice of a surety; even in that

(*a*) *Clayton's Case*, 1 Mer. 608—610, 611. The customer has a right to resort for payment of what is due to him out of the estate of the deceased partner to that estate, without regard to the state of the account, as between the deceased and the surviving partners. *Devaynes v. Noble*, 2 Russ. & M. 495.

(*b*) *Bodenham v. Purchas*, 2 B. & A. 45. See *Simson v. Ingham*, 2 B. & C. 72; *Anon. Cro. Eliz.* 68; *Goddard v. Cox*, 2 Stra. 1194; Bull. N. P. 174; *Pinnel's Case*, 5 Rep. 117; *Williams v. Griffith*, 5 M. & W. 300.

case, the earlier items of the account will be those to which the earlier payments are to be regarded as appropriated (c).

An account was kept in the form of a banking account, charging the customer with the whole debt, from time to time, in the half-yearly balances; but the parties were ignorant of the fact that the legal rule of appropriation would carry subsequent payments to the discharge of the earlier guaranteed debts. At a later period a partner in the bank wrote a letter to the customer, amounting to a representation that the payments in to his account were appropriated to the unsecured items of debt: it was held, first, that the ignorance of the parties did not prevent the operation of the rule in *Clayton's case*; and secondly, that the subsequent payments by the customer, made on the faith of the representations in the letter, must be appropriated to the later items of debt (d).

Distinct Accounts.—It is necessary, however, to keep in mind that where there are distinct accounts kept, and the customer is overdrawn and makes a general payment, without specifically appropriating it *at the time*, and there is no course of dealing, or other circumstances, showing clearly how he must have intended to appropriate the payment (e), *that* is not a case within the rule we have been stating, which applies only in case of a running unbroken account: that is a case in which the banker may apply the payment to which account he pleases (f); and he is not bound to do it instantly, but may take a reasonable time (f). On the other hand, if the customer owes the banker, on several accounts, and pays in money, he, the customer, has a right to say *at the time* to which debt the payment shall be applied (f).

(c) *Williams v. Rawlinson*, 3 Bing. 71.

(d) *Merriman v. Ward*, 1 Johns. & H. 371.

(e) See *Wilson v. Hirst*, 4 B. & Ad. 766; *Stoveld v. Eade*, 4 Bing. 154; *Lysaght v. Walker*, 5 Bli. N. S. 1; *Brown v. Anderson*, 2 Moore, P. C. 245.

(f) *Simson v. Ingham*, 2 B. & C. 72, 75. Entry in the customer's books is not evidence of the appropriation by him. *Manning v. Westerne*, 2 Vern. 606.

A municipal corporation kept an account at a banking house. Afterwards, becoming invested with the functions of a local board of health, the corporation opened a second and separate account with the bankers. The bankers stopped payment, at which time there was due to the corporation, on account of its municipal affairs, a large sum of money; and there was due from the bank to the corporation, in respect of the local board of health account, a similar amount: it was held, that the corporation was entitled to set off these claims one against the other, for although the accounts were separate, the corporation was a creditor in the first account and a debtor in the second, and in the same right (*g*).

Partnership.—Surviving partners in a bank may, on the death of a partner, object to continue an account with a customer as one unbroken account; and it is no proof that they have elected to treat it as a continuance of the old account to show entries in the bank books to that effect, if they were not, at the time, communicated to the customer.

The same principle applies when the partnership expires: thus, Brooke, a lieutenant-colonel in the army, employs one Gilpin, as army agent and banker, to receive his pay and allowances, and also dividends on his stock, and other monies on his account, and from time to time to make payments to him, or his order, for which purpose he was in the habit of drawing on Gilpin, who, from time to time, sent in his account to the employer.

Brooke continued to employ Gilpin in this way from some time before the year 1807 down to the year 1819, when Gilpin became bankrupt; no rest was made or balance struck in the account after the 1st of July, 1816, and during the whole period of the account there was always a considerable balance due to Brooke.

(*g*) *Pedder v. Preston (Mayor, &c.)*, 9 Jur., N. S. 496; 11 C. B., N. S. 535; 31 L. J., C. P. 291.

On the 24th of September, 1807, Gilpin entered into partnership, *for a period of ten years*, with one Enderby, but the business continued to be transacted in the name of Gilpin alone, and Brooke had no notice or knowledge of the partnership until after the bankruptcy of Gilpin ; and the receipts and payments prior and subsequent to the 24th of September, 1817, when the partnership expired, formed part of one general account.

Then, on Brooke bringing an action against Enderby and Gilpin, to recover the balance due to him at the expiration of the partnership, it was held that (Gilpin having pleaded his bankruptcy) Enderby was entitled to consider any sums paid by Gilpin after the expiration of the partnership, as being paid in reduction of the balance then due to Brooke, and might take credit for them, without giving credit to Brooke for any sums received after the expiration of the partnership, by Gilpin, on account of Brooke (*g*).

The acting member of a partnership has an implied authority to assent to the transfer of their account from one bank to another, without an express assent of the other partners. Upon such transfer, however, the actual amount due is alone transferred. Where the balance due from the firm at the time of the transfer has been overtopped by subsequent payments to their credit, as to which there has been nothing to take the case out of the ordinary principle of appropriation of payments to the earlier items, the banker has no right of action in respect of the balance existing at the time of transfer, which has thus become extinguished, but only in respect of the balance subsequently become due (*h*).

The rule is quite settled. On the one hand, monies drawn out on a banking account are to be applied to the earlier items, on the opposite side of the account. By every payment which he makes, the banker discharges so

(*g*) *Brooke v. Enderby*, 2 B. & B. 70.

(*h*) *Beal v. Caddick*, 2 H. & N. 326 ; 26 L. J., Exch. 356.

much of the debt which he first contracted (*i*). On the other hand, monies paid in by the customer go in discharge of any debt which may be due on the account from him to the banker at the time of his paying in the money; applying, in like manner, any part payment, to the discharge of the earlier debt.

A payment by a customer can be appropriated by the banker to a debt due to him and his former partner, instead of to a debt due to the banker alone (*k*).

It is equally certain, however, that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case. Thus, if a bond were given by several persons, including a customer, to secure bankers against advances which they might *from time to time* make, to the extent of 1,000*l.*, to the customer: that would show that the amount of it was not to be brought into the account as one of the items, but that it was to be a continuing security, so that although, between the date of the bond and the failure and bankruptcy of the customer, the balance in his favour had been larger than the amount due upon the bond, for principal and interest, that circumstance does not show that the sum in the bond is to be taken as paid off (*l*); and the same might be the case though the bond were not so worded, but if the conduct and expressions of the parties were such as to show that a continuing guarantee was contemplated (*l*).

Legal Items.—If there be a running account between the customer and the bankers, and the bankers make large advances to him, part of these advances arising out of illegal and part out of legal transactions, and the customer from time to time deposits bills and makes payments, without any specific appropriation or any settlement of the

(*i*) *Pennell v. Deffel*, 4 De G., Mac. & G. 391. The rule is the same whether the account is kept with the customer, as regards his own money, or that of a *cestui que trust*; *S. C.*

(*k*) *Snead v. Williams*, 9 L. T., N. S. 115.

(*l*) *Henniker v. Wigg*, 4 Q. B. 792.

account: it will be held, that the payments must be applied to the reduction of the earlier items of the account, and the legal, and not the illegal, part of the demand (*m*).

Specific Appropriation.—When money is paid in on a specific account by the customer, and accepted by the banker, the money cannot be appropriated to any other account or debt. Therefore, where a customer paid a sum of money to a country banker, with instructions to remit 500*l.*, part of the sum, to a London banker, to meet the acceptances of the customer, and the banker, on the same day, sent several bills to a bill broker, directing him to remit the proceeds to the London banker, and directed the London banker to meet the acceptances, and on the next day the country banker stopped payment: it was held, that the sum of 500*l.* was specifically appropriated, and that the customer was entitled to recover it back in full (*n*).

(*m*) *Ex parte Randleson*, 2 Deac. & C. 534; *Wright v. Laing*, 3 B. & C. 165.

(*n*) *Farley v. Turner*, 26 L. J., Chanc. 710.

CHAPTER XII.

LIEN.

THE general lien of bankers is part of the law merchant, to be judicially noticed, like other parts of that law (a).

Securities for Special Purposes.—A banker's lien does not attach on securities placed in his hands for a special purpose, *ex. gratiâ*, where exchequer bills are deposited, in order that he may receive the interest on them and get them exchanged for fresh bills; for such special purpose is inconsistent with the notion of a general lien, inasmuch as the bankers undertake to do what is usual for bankers to do as regards the exchequer bills; in other words, they agree to return the bills (or to do what is equivalent to returning them) as soon as the particular purpose for which the bills have been entrusted to them has been performed. Now, an undertaking to return a thing, by a given day or hour, is manifestly inconsistent with the claim of a general lien on the thing by the party undertaking. It is according to the same principle, that if a customer goes to his banker, requesting him to get a bank post bill, for the purpose of transmitting into the country 1,000*l.*, which he hands over to him in bank notes, the banker, unless he expressly states that he receives the notes only subject to his lien, has no right to retain or apply them to any other purpose than that for which he receives them.

Where a customer deposited with his bankers a deed of conveyance, comprising two distinct properties, giving to

(a) *Brandao v. Barnett*, 12 Cl. & F. 787; *Bock v. Gorrissen*, 30 L. J., Chanc. 39; 2 De G., F. & J. 434; *Jones v. Peppercorne*, Johns. 430; 28 L. J., Chanc. 153.

them at the same time a memorandum pledging one of the properties as a security for a specific sum advanced, and also for his general balance, it was decided that, as the deposit of the deed of conveyance was for a special purpose of giving a security upon one property only, the bankers could not claim a general lien, by virtue of the custom of bankers, on the other property (*b*).

A security, given by a customer to his bankers, for the balance "which shall or may be found due on the balance of" his account, covers the existing balance only, and is not a continuing security for the floating balance (*c*).

If a customer deposits securities with his bankers, to indemnify them, to the extent of 1,000*l.*, then advanced by them, and afterwards becomes indebted to them in an additional sum of 500*l.*, on his running account with them, they have no lien on these securities beyond the 1,000*l.* and interest (*d*).

But unless there be an express contract, or circumstances showing an implied contract inconsistent with the principle of lien, bankers have a general lien on all securities deposited with them, *as bankers*, by their customers (*e*).

Plate.—Accordingly, bankers have no lien for the balance of their account against a customer, on his *plate* deposited in his chest with them for safe custody (*f*).

Trust Deeds.—Nor can bankers carry into effect any lien which they may *primâ facie* have upon securities deposited with them, which are, in fact, trust deeds. Thus, if a customer deposits title deeds, as a security for advances, and the property comprised in the deeds is subject to a trust, *in breach of which the deposit is made*, then,

(*b*) *Wylde v. Radford*, 33 L. J., Chanc. 51.

(*c*) *In re Medewe*, 26 Beav. 588; 28 L. J., Chanc. 891.

(*d*) *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Zinck v. Walker*, 2 W. Bl. 1154; see *Ashton v. Dalton*, 2 Collyer, 565.

(*e*) *Brandao v. Barnett*, 12 Cl. & F. 787.

(*f*) See *Ex parte Eyre*, 1 Ph. 235; 12 Cl. & F. 794, 797; per Lord Campbell, *Brandao v. Barnett*, 12 Cl. & F. 809; and *O'Connor v. Majoribanks*, 4 M. & G. 435.

although the bankers have no notice of the trust, it must prevail against their lien (*g*), unless there is negligence of such a character, on the part of the *cestui que trust*, as to deprive him of his right to the trust fund (*h*).

Securities left by Mistake.—Nor has a banker any lien on securities by mistake, or casually, left at the bank, upon the occasion of an application to him to advance money on them, which he had refused to do (*i*).

Trust Shares or Property of Third Persons.—Again, in such a case as the following, the bankers have no lien. A., one of the trustees of a fund, holds certain shares in a banking company, in his own right, and deals with and purchases shares therein to a considerable extent. A portion of the trust fund is invested in shares, in A.'s name. There was no distinguishing mark by which the individual shares could be traced, the whole being in the nature of capital, expressed by terms of quantity. A. then agrees to assign a certain number of the shares, standing in his name, to the banking company, as security for repayment of advances which had been made to him by them; but no formal transfer was ever made. A. then becomes bankrupt, not having in his ownership at the time a sufficient number of shares to satisfy the trust and also to execute the agreed assignment to the banking company.

Here the banking company has no lien on any of the shares which A. had held in trust; and though the shares held in trust, being originally purchased with trust money, possibly might have been dealt with by sale and repurchase, the trustee must still be considered as holding for the purposes of the trust the same number of shares, out of a larger number which stood in his name at the time of the bankruptcy: and of the two equities, that of the *cestuis que trustent*, and that of the banking company—no actual

(*g*) *Manningford v. Toleman*, 1 Collyer, 670.

(*h*) *Stackhouse v. The Countess of Jersey*, 30 L. J., Chanc. 421.

(*i*) *Lucas v. Dorrein*, 7 Taunt. 279.

assignment of the shares having been made, pursuant to the agreement—the former prevails, following the same rule in this as we have seen adopted in other instances, and the *cestuis que trustent* are not bound to give notice of the trusts to the bank (k).

Bankers, however, have no lien upon railway stock deposited or pledged with them by a customer, after they receive notice that the stock is the property of another person. A recent case (l) clearly establishes this proposition. In 1859, one L. applied to Messrs. B., auctioneers, to lend him 200*l.* on the security of 1,200*l.* preference 6*l.* per cent. stock in an Irish railway company. This they agreed to do, but they obtained the money from their bankers, the Bank of London, on the security of the stock. L. thereupon executed a legal transfer to Marshall and Boore, two of the public officers of that bank, and the certificates were delivered to them. Afterwards, Messrs. B. transferred their banking account to Messrs. Prescott, who, at their request, advanced the 200*l.* for redeeming the stock in the hands of the Bank of London. They paid the amount to the Bank of London, and, upon L.'s written authority, Marshall and Boore executed a transfer of the stock in blank, that is, as regarded the date and the name of the transferee, the certificates and transfers were handed over by Messrs. B. to Messrs. Prescott, their bankers, as a security for their advance. At this time, Messrs. Prescott clearly had no notice or knowledge of L.'s having any interest in the stock, but on the 31st of May, 1860, this letter was written by Messrs. B. to them:—

“We observe that Saturday next is the day on which the term of the loan upon the Waterford and Kilkenny 6*l.* per cent. preference stock expires. We have been requested *by our principal* to extend the term to the 2nd of September ensuing, which we have consented to do.

(k) *Murray v. Pinkett*, 12 Cl. & F. 764.

(l) *Locke v. Prescott*, 32 Beav. 261.

We beg, therefore, if convenient, you will oblige us in a similar way."

In July, 1860, Messrs. B. became bankrupt. There being a balance of 200*l.*, beyond the 200*l.*, due from them to Messrs. Prescott on their general banking account, Messrs. Prescott sold the stock, and claimed to retain the proceeds in repayment, not only of the 200*l.*, but also of their general balance: it was held, however, by Sir John Romilly, that the letter of the 31st of May, being unambiguous in its terms, was distinct notice to Messrs. Prescott, that there was a *principal* who had advanced the stock to or deposited it with Messrs. B., and that after such notice they had no right to advance any more money to Messrs. B. on the security of the stock, which they knew belonged to another person, or to hold it as a security for a floating or the general balance due to them from Messrs. B. After that period they were not entitled to consider the stock as a security for anything more than the 200*l.*, which they had advanced without notice of L.'s interest. The Master of the Rolls therefore decreed that Messrs. Prescott must account for the proceeds of the stock after deducting the 200*l.*, and interest which was due upon it.

Nor can it be successfully argued, that, in case of a shareholder of a banking company being a joint stock company, the shares are the subject of lien, in favour of the banking company, on the ground that the shareholder being a partner, then, in case he is indebted for advances, or might be found to be indebted upon winding up and balancing the accounts, the bank has a right to retain the shares, in order to secure themselves (*m*). Even in the case of a common partnership, such a doctrine is to be taken with very great allowance; because, in such case, there must be a winding up and dissolution, *before* you can tell what one partner owes to another. But the very object of a joint stock bank is, to enable persons to enter

(*m*) 12 Cl. & F. 783, 784.

and quit the concern, without the necessity of a winding up or dissolution, and when you cannot tell how the account may stand between the parties(*m*); and, therefore, in the absence of special provision in the deed of settlement, one of the shareholders, borrowing of the bank, is put in the same position as any other customer(*m*).

It appears not to be disputed, that the right which, by the deed of settlement, the directors of a joint stock banking company may have, of objecting to the transfer of shares, cannot be exercised, for the purpose of exacting payment of a debt due to the bank from the shareholder, whose shares are proposed to be transferred(*n*).

In the following case, from somewhat different facts, a different conclusion was drawn.

One of the provisions, of the settlement deed of a banking company, was, that the company should have a lien on the shares of such proprietors as were customers, and indebted to the bank, and that no share should be transferred without the consent of the directors. An abstract of these rules was indorsed on the certificate of each share.

In *such a company*, the shares of indebted customers do not pass to the assignees of the customers on their bankruptcy, so as to defeat the lien of the bank(*o*).

In case, however, there had been no rule requiring the consent of the directors for the effectual transfer of shares, and no stipulation for lien, &c., so that an owner would have had unrestrained power of disposing of his shares; there the shares would have been considered to be in the order and disposition of the owner at the time of his bankruptcy, and to pass to his assignees accordingly(*p*).

Trust Monies.—But a transaction, such as the following, gives a sufficient lien.

(*m*) 12 Cl. & F. 783, 784.

(*n*) *Pinkett v. Wright*, 2 Hare, 120; *Ex parte Caldecott*, 2 M. D. & De G. 388.

(*o*) *Ex parte Plant*, 4 Deac. & C. 160.

(*p*) *Nelson v. London Assurance Company*, 2 Sim. & S. 292.

The trustees of a trust fund have an account with the East of England Joint Stock Banking Company, as such trustees. One of the *cestuis que trustent* has a private account with them, which is much overdrawn; upon their agreeing not to press for the reduction of the balance against him, he offers to give them a lien on the monies, coming to him in respect of his share of the trust fund: and to this they agree. Accordingly, he addresses a letter to one of the trustees, authorizing and requesting him to pay, to the credit of his (the *cestui que trust's*) account with the bank, such sums as might be awarded to him out of the trust fund. This was held to give the bankers a valid lien upon the proceeds of the fund, and being intended, by both parties, at the time it was given and received, to be irrevocable, must be considered in equity to be so, to all intents and purposes (*q*).

Bills of Exchange.—So, if a customer lodges undue bills of exchange in the hands of his banker, and draws upon them for any money he wants in advance, the banker charging no interest on these advances, but selecting out of the bills such as were nearest in amount to the sum advanced, and discounting these, debiting the customer with the amount of such discount in his account, but without any special agreement to that effect; then there is nothing, in these circumstances, to invalidate the banker's right of lien for his balance, on all *other* bills placed in his hands by the customer (*r*), besides those that he discounts; and it seems to be universally true, that a customer cannot get back paper securities in his banker's hands, without paying the balance against him, unless there is some special contract between the banker and the customer inconsistent with the general lien (*s*).

(*q*) *Ex parte Steward*, 3 M. D. & De G. 265; see *Pannell v. Harley*, 2 Collyer, 241; *Somerset v. Cox*, 10 Jur., N. S. 351.

(*r*) *Davis v. Bowsher*, 5 T. R. 488.

(*s*) Per Lord Campbell, in *Brandao v. Barnett*, 12 Cl. & F. 787; and Wood, V. C., in *Jones v. Peppercorne*, 5 Jur., N. S. 140; 28 L. J., Chanc. 153.

Title Deeds.—A., being entitled to one-third part of some freehold property, in his own right, and to another third part, as heir-at-law to his brother, deposited the title deeds of the property with his bankers, as security for advances. The personal property of the deceased brother, who was a trader subject to the bankrupt laws, was insufficient to discharge his debts, and therefore *his* third of the property became, by virtue of the 11 Geo. IV. & 1 Will. IV. c. 47, s. 9, assets for the payment of his debts.

Nevertheless, it was held, that the bankers' lien extended over both thirds of the property, in preference to any claims of the creditors of A.'s brother (*t*).

Exchequer Bills.—The rule is so strong as regards the lien on securities, which come into the bankers' hands *without being appropriated to any special purpose*, or entrusted to them for safe custody or the like, that it attaches on bills and notes payable to bearer, or on exchequer bills, which pass by delivery, although the customer depositing them were not the real owner, and had no authority to saddle the property in them with a lien (*u*), provided the bankers, at the time of the deposit, have no notice of any equitable trust or title attaching to these securities.

Promissory Notes.—On the other hand, if I deliver promissory notes to a person to get discounted for me, and he carries them to *his* banker for that purpose, but the banker insists upon placing the notes to the credit of the customer, whose account shows at the time a balance against him, the banker will be obliged in equity to account to me (*x*).

If bills of exchange be deposited, *indorsed*, with the bankers, they have the absolute power of disposing of

(*t*) *Ex parte Baine*, 1 M. D. & De G. 492.

(*u*) *Barnett v. Brandao*, 6 M. & G. 630.

(*x*) See *Lord Bolingbroke's Case*, in *Joy v. Campbell*, 1 Sch. & L. 346.

them; if the bankers become bankrupt, although the customer may recover such of the bills as remain in *specie*, subject to the banker's lien for the balance of his account, yet he cannot follow the proceeds that may have been converted to the bankers' use (*y*).

Partnerships.—Bankers have no lien on the deposit of a partner, on his separate account, for a balance due to the bank from the firm (*z*). A firm had an account with a bank, one of the firm had a separate account with the same bank. Upon the bank discounting a promissory note of one of the firm, he deposited with the bank certain shares as a security for the same, or for any sums of money in which he might then be or might thereafter become indebted to them. The shares afterwards became the property of the firm, which became bankrupt largely indebted to the bank: it was held, that the bank was not entitled to hold the shares as a security for the joint debt, but for the separate debt only of the partner depositing the shares (*a*).

Realizing Lien.—Little has been decided to illustrate how the law provides that the banker is to realize, and make productive, his lien on securities.

In case of any negotiable security which comes to his hands on account of a customer, to whom the banker is in advance, he has, as has been said, a lien or power of detention; and in order to make such power productive, he may put the negotiable instrument in suit (*b*), and recover upon it so much as will cover the balance due to him from the customer (*c*).

(*y*) *Ex parte Pease*, 1 Rose, 232; *Ex parte Wakefield Bank*, 1 Rose, 243; 19 Ves. 25. It is considered a discreditable thing for bankers to carry into the market bills which are specially indorsed, *id.* 251.

(*z*) *Watts v. Christie*, 11 Beav. 546.

(*a*) *Ex parte M'Kenna*, 30 L. J., Bank 20.

(*b*) *Bolland v. Bygrave*, R. & M. 271; *Bosanquet v. Dudman*, 1 Stark. 1.

(*c*) *Scott v. Franklin*, 15 East, 428. The lien is only, at most, co-extensive with the balance due, *per Eyre*, C. J., *Bolton v. Puller*, 1 B. & P. 546.

But, instead of advancing their remedy, bankers will destroy their right of lien, if after a lien has been established they take a security, *which is payable at a distant day*, for the debt (*d*).

(*d*) *Cowell v. Simpson*, 16 Ves. 278; *Hewison v. Guthrie*, 3 Scott, 311; 2 Bing. N. C. 755.

CHAPTER XIII.

PARTNERSHIPS AT COMMON LAW.

MANY questions arise, in banking transactions, which are governed by the rules relative to partnerships which prevail at common law. We shall at present consider, as well such questions as seem to be of importance to private banks, carrying on business in partnership, or under a firm as such, as usually arise in the business of and as are of importance to bankers of whatever class, who deal with firms of partners as customers.

Cases respecting copartnerships, in banking, under the 7 Geo. IV. c. 46, as they stand upon different and special grounds, have been treated apart; and the same has been done with respect to joint-stock banking companies, and chartered and limited banking companies.

Acts of single Partners.—One of the partners in a bank caused stock, belonging to a customer of the bank, to be sold out, by means of a power of attorney, which he forged. The proceeds of the stock were paid to the account of the banking firm, at the house of the bank's agents, and were appropriated by the partner, who was afterwards *found guilty of other forgeries, and hanged*. His partners were, in fact, ignorant of the fraud, but might have known it by the exertion of common diligence. The customer was held entitled to maintain an action against the partners for the amount (a).

Also, in such a case, Courts of Equity, for the protection of persons who deal with partnerships, *impute* knowledge, and hold the firm to be individually liable (b).

(a) *Marsh v. Keating*, 2 Cl. & F. 250.

(b) *Sadler v. Lee*, 6 Beav. 324.

So, it has been laid down, that if one partner in a banking house colludes with a member of a trading firm in a transaction connected with the business of the bank, the banking firm is liable to the trading firm for any damages which the latter may have suffered by reason of such a transaction. Longman & Co., booksellers, banked with Pole & Co. On a certain day, Hurst, a partner in Longman's house, sent cash to the bank, in order to take up three bills of exchange, accepted by him, in the name of the firm, and coming due next day. The bills were taken up, but, by Hurst's order, were not entered in the books of Longman & Co. About the same period, it appeared in evidence, Downes, a partner in the bank, told one of the clerks that a bill of Longmans' would come in on such a day, which was to be paid and given over to him (Downes), and that he was to debit Hurst with it in the *note book*, in which private transactions were entered, so that it might not go into the ledger. Downes soon afterwards gave a similar direction respecting another bill of the same kind; and these bills were entered into the note book accordingly, and the cash payments were entered in the same book to Hurst's credit, and consequently no trace of these transactions appeared, either in the pass book of the bankers, or in the cheque book of Longman & Co. Hurst afterwards retired from the partnership, receiving the full amount of his capital, and became bankrupt. Longman & Co. were subsequently obliged to pay bills accepted by him, in the name of the firm, to a very large amount. An action was considered to be clearly maintainable by Longman & Co. against Pole & Co., in respect of the damages arising to the former, out of the collusion of one of the latter firm with Hurst (c).

Where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted it, upon condition that the drawer should provide for it, when due, the firm was adjudged to be bound by this act

(c) *Longman v. Pole*, Danson & L. 126; M. & M. 223.

of the partner, and they were not allowed to sue the acceptor; for the partner, not having performed the condition on which the acceptor accepted, could not have done so, and they could not be in a better position than he was (*d*).

Where a customer gives a promissory note to his bankers on account of a supposed balance due to them (there being, however, a mistake as to this), and the bankers indorsed the note to another firm, consisting of some of the partners of the banking house, he is at liberty to set off the debt due to him from his bankers, in an action brought against him on the note by the firm who held it; the knowledge of one of the partners in such firm being deemed equivalent to notice to all, and, therefore, that they were affected by the state of the accounts between him and his bankers (*e*).

If a partner allows a customer to overdraw his account, and, by way of security, takes bonds from the customer, executed to himself and not to the firm, that is such misconduct as will warrant a Court of Equity in decreeing a dissolution (*f*).

An acting partner has implied authority to assent to the transfer of their account from one banker to another, without the express assent of the rest of the firm, but it is doubtful whether the acting partner has such authority to borrow a sum from the transferee of the account, in order to pay off the bank from which the transfer was made, or those who constituted it (*g*).

One of several partners in a banking-house died; a customer, two months after the death, having notice thereof, drew a cheque on the house, in the name of the old firm, which was paid to the bearer; no other receipts or payments took place, until the bankruptcy of the partnership nine months after the death, under which the customer proved for the balance remaining due to her, and received dividends thereon, which reduced the debt to 216*l.*; the

(*d*) *Sparrow v. Chisman*, 9 B. & C. 241.

(*e*) *Puller v. Roe*, Peake, 197.

(*f*) *Master v. Kirton*, 3 Ves. 74.

(*g*) *Beal v. Caddick*, 26 L. J., Exch. 356.

question was, whether, for this amount the deceased's estate was liable.

Now, a partnership contract, being *in form only* joint, is held to create only a joint obligation, which consequently attaches exclusively upon the survivors (*h*). By the mercantile law, that is, according to the prevalent ideas of obligations and rights governing the commercial law of Europe, a partnership contract is several as well as joint (*i*). As to equity, the doctrine laid down formerly seems to have been that the creditors of the firm had no claim against the estate of the deceased partner, except when the surviving partners were, at the time, or subsequently became, insolvent or bankrupt (*k*). But this view has long been departed from. It is now held in equity, that partnership debts are joint and several (*l*); and in a suit by a creditor of the firm against the representatives of a deceased partner and the surviving partner, the creditor is entitled to satisfaction out of the assets of the deceased partner, though it be not proved that the surviving partner was insolvent (*l*); and, there being no difference in principle between a banking partnership at common law and any other partnership, and no new contract arising from the customer leaving the money in the bank after the death, the customer was held entitled to receive the balance above mentioned from the deceased's separate estate (*m*).

Under the circumstances already mentioned, it was laid down also, that the partnership having wrongfully sold some exchequer bills, deposited with them, in the lifetime of the deceased partner, and, presumably, with his privity, the transactions being entered in the books, and the death of the partner not taking place until five months afterwards,

(*h*) *Sleech's Case*, 1 Mer. 564; Story on Partnership, 361; *Richards v. Heather*, 1 B. & A. 29.

(*i*) Collyer on Partnership, 404, 2nd edit.

(*k*) Collyer on Partnership, 404—408, 2nd edit.; Story on Partnership, 362.

(*l*) *Wilkinson v. Henderson*, 1 M. & K. 581.

(*m*) See note (*h*), *supra*.

and the produce being applied to the use of the house, the amount became a partnership debt, accruing from the moment they were sold without the consent of the creditor, and interest was allowed, at 5*l.* per cent., from the time of the sale. The question, whether or not the individual partners were privy to the sale, was regarded as immaterial (*n*).

So, in the same case, it was held that creditors, in respect of stock, standing in the partnership name, which was sold in breach of trust, and the proceeds applied to the use of the house, were entitled as against the estate of the deceased partner, either to regard the amount as a debt, or to have the stock specifically replaced, at their option; and the same would be ruled if the stock stood in the name of one partner only, and was sold by him only, the proceeds going, as before, to the use of the house (*o*).

So, in the same case, it was held that exchequer bills, having been deposited by a customer, under an agreement to return them, or other bills in lieu of them, when paid off by the government, and the bills were sold, some in the lifetime of the deceased, and others after his death, the deceased's estate was not liable in respect of the amount of the latter debt (*p*).

A lady, having an account with a banking house, consisting of several partners, was advised by one of them to dispose of certain Dutch bonds, of which she was possessed, and to place the proceeds on better security; he suggested, also, that the money should be lent to his son. In this plan the lady acquiesced, in consequence of the great confidence she had in the firm, and gave the partner a cheque upon the bank for the money, payable to a third person named, or bearer, and received a promissory note for repayment, with a guarantie, from the partner, who afterwards absconded, and the security proved worthless.

(*n*) *Clayton's Case*, 1 Mer. 579, 580.

(*o*) *Baring's Case*, 1 Mer. 611.

(*p*) *Houlton's Case*, 1 Mer. 616.

On the lady filing a bill in equity against the remaining partners, it was held that they were *not* liable for the loss, because the transaction was not within the scope of a banker's business, and was not recommended or sanctioned by the other partners (*q*).

In the following case, where the person obtaining the money was sole manager, not a partner, a Court of Law decided differently. The wife of a person, resident abroad, herself residing in England, had a deposit account with a joint stock bank; the arrangement being, that a customer, having such an account, never drew cheques, but the bank gave a deposit receipt, when the money was lodged, and the customer might, at any time, on presenting the receipt, with his name indorsed on it, obtain his principal and interest up to the day of repayment. The manager represented to her that the bank had an equitable mortgage on some houses, subject to a mortgage for 400*l.*, and advised her to purchase the houses for 595*l.*; 400*l.* to be paid in discharge of the mortgage, 195*l.* to the bank. Her account with the bank showed 775*l.* in her favour at that time. Out of this the adviser, being manager of a branch bank, where none of the members of the company resided, drew out of the bank 595*l.*, by presenting the deposit receipts indorsed at the counter, a fresh deposit receipt for 180*l.*, the balance remaining due for principal and interest, being handed to the customer. The manager absconded with the money.

When the customer sued the bank, although it was urged that this transaction was not within the scope of banking business, and that the manager was not authorized to sell property of the bank, the jury found the manager to have intended to make the customer believe, and that she did believe, him to be acting as agent to the bank, and the Court, therefore, held the bank to be responsible for the money (*r*).

(*q*) *Bishop v. Countess of Jersey*, 2 Drew. 143; 23 L. J., Chanc. 483.

(*r*) *Thompson v. Bell*, 10 Exch. 11.

Good-will.—A testator was member of a partnership, at will, in a bank; there being no provision entitling the executor of a deceased partner to an interest in the good-will of the concern. It was stated that the credit, in which the bank was, at the time of the death, was so good from the well-known wealth of its members, that it was unnecessary that the partners should retain, at the banking house, any considerable surplus of assets, above the liabilities; and, in fact, the whole assets of the partnership, then and for some time previously, exceeded the liabilities by a small amount. The bank was a bank of issue as well as of deposit; and the profits of the partnership arose from the employment, at interest, by way of loans, to customers, on overdrawn accounts, and otherwise, and investments in other modes, of monies placed in their hands by way of deposit, and of the amount of their notes in circulation.

Each of the partners was entitled to one-third of the assets of the partnership, and liable to the payment of one-third of the liabilities thereof.

The testator's share in the assets, at his death, was much exceeded by the balance of his account, as a customer, with the bank, and due from him to the concern. After his death, the surviving partners admitted into the firm his son, and executor; but they did not admit him *as executor*, and the business continued to be carried on, as before the death, without any separation, or appropriation, of the partnership assets, as they stood at the death.

In a suit against the executor for the administration of the testator's estate, the Court of Chancery held him not to be accountable to the testator's estate for the profits which he had received as a partner; in fact, deciding that the good-will in the bank, placed in the circumstances above detailed, having, in fact, no capital, and the testator having died indebted to the bank, was worth nothing (s).

(s) *Simpson v. Chapman*, 4 De G., Mac. & G. 154.

After the testator's death, a number of notes of the old firm was re-issued. By the notes so re-issued, however, it is not to be assumed that the testator's estate would have been bound; most probably it would not; on the other hand, it was probable these notes obtained currency, in some degree, from the use of the testator's name upon them.

The case was said, by Lord Justice Turner, to involve questions of very great importance (which the Court, on that occasion, was not called on to decide), as to what is to be considered as capital of an out-going partner, with reference to a banking concern.

Where, after the death of one of two partners in a country bank, the survivor sold the business for 10,000*l.*, it was held that the estate of the deceased partner was entitled to a share of so much of the purchase-money as was attributable to the good-will; but, in apportioning the proceeds of the sale, regard must be had to the circumstances: first, that the partnership premises belonged to the survivor; secondly, that he had still the right to carry on the same business in the same locality; and thirdly, that the sole right of issuing notes belonged to him (*t*).

Partnerships in other Firms.—A question sometimes arises when several partnerships are carried on under the same name, but having, in fact, separate businesses and concerns; and bills drawn under the name of the firm, common to them all, but in which, for some of the purposes, all of the partners of the several partnerships, are not members, are discounted by the bankers: then, against whom are the bankers to proceed in case of dishonour?

Now, if a firm of A. & Co. trades in the above manner, and the partnership name or style or firm appears pledged to a bill, all the partners, whoever they may be, and whether known or secret partners, will be bound, suppos-

(*t*) *Smith v. Everett*, 27 Beav. 446; 27 L. J., Chanc. 236.

ing the case to be free of facts operating to impeach the title of the party who seeks to charge them (*u*). This is a well-established law. Hence, where a bill was drawn in the name of "James King & Co.," and an indorsee sued on it a person who was a partner in that firm, and it also appeared that there were other partnerships carried on under the firm of "James King & Co.," in which the other drawers of the bill were concerned, but in which the defendant had no share, there, although he offered to show the bill to have been drawn, *not* on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it, he was considered to be liable on the bill; for he had traded with the other partners under that firm, and persons taking bills under it had a right to look to him for payment, although they had taken without his knowledge. The defendant was sued alone, because the other partners had become bankrupt (*x*).

Even if the several partnerships do not trade, generally, under one name, but conduct a particular business, apart from their general trade, in respect of which they negotiate bills, under one name, which is that of one of the firms, and not of all the firms collectively, the same holds good.

Thus, in the instance of a Scotch case, which was finally disposed of in the House of Lords. Hugh Mathie & Co. carried on trade in partnership at Greenock. Another branch of trade was conducted by Mathie and Fleming, between that place and Nassau, New Providence; Fleming having no share in the partnership of H. Mathie & Co. The Nassau trade was carried on at Greenock by Hugh Mathie & Co.; at Nassau, by one Home; and at London, by Fleming & Co. Mathie kept separate accounts for the concern.

Certain bills had been discounted at the branch of the Bank of Scotland, in Greenock, subscribed H. Mathie &

(*u*) See 1 C. & J. 318.

(*x*) *Baker v. Charlton*, Peake, 111.

Co., and no explanation was required or given at the times of the discounts.

H. Mathie & Co. failed, and the agent of the bank, on the ground of his having given credit to Fleming, as included in the firm, made his demand on Fleming. A proof was taken, and the Court of Session was satisfied that Fleming was not a general partner with H. Mathie & Co., but that bills, having formerly been discounted under that firm for the use of the Nassau concern, and sanctioned by Fleming, a credit was raised, entitling bill holders to rely on his credit, and he was accordingly held to be liable; and the House of Lords confirmed the general principle of the decision; which seems to be, that where several partnerships, consisting of different individuals, carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of those partnerships he chooses for his debtors, though he cannot take all the partnerships as his debtors (*y*).

Two of three partners are members of a joint-stock banking company. A joint *fiat* in bankruptcy issues against their firm, which is jointly indebted, at that time, to the banking company, which, though itself insolvent, was held entitled to prove against the joint estate of the three partners (*z*); and so it would have been if the firm had consisted of a single member of the banking co-partnership (*a*).

Two of the partners, carrying on business as the Horseley Coal and Iron Company, also carry on trade—distinctly from the former—as bankers. They are not the ordinary bankers of the company. They lend to the company several sums of money, at interest, without security, under circumstances leading to the inference that the advances would not have been made unless the bankers had been partners in the company.

(*y*) See Collyer on Partnership, 271, 272.

(*z*) *Ex parte Law*, 1 M. D. & De G. 16.

(*a*) *Ex parte Caldecott*, 2 M. D. & De G. 368.

On the bankruptcy of the company, it was held (in the absence of evidence, except such as the nature of the transaction itself furnished, to show that the character of a banking transaction belonged to it), that these advances were not made by the bankers in their character of bankers, and were not, therefore, dealings between trade and trade, entitling them to prove against the estate of the company (b).

Libel on.—Bankers, in partnership, may join in maintaining an action, for a libel against them in respect of their business and touching their credit, without disclosing the ratios or shares in which each of them is interested in the concern; for there cannot be, it would appear, any separate damage; the business injured is the joint business, and the libel only affects the partners through their business; then the defendant has nothing to do with their respective proportions of interest in the business; it is nothing to him how the compensation they may recover will be divided among them.

It was also held, that to say of a banker that he has suspended payment is actionable; for it is saying that he cannot pay his debts; and a temporary inability to pay debts is insolvency; and such action is maintainable, without setting out or showing special damage (c).

Dissolution.—A firm of partners in banking agrees to dissolve, and a deed is prepared and executed, by which two of the firm retire, and the other two members of it stay in the business, taking the concern in its actual state, and covenanting to indemnify the retiring partners against all liabilities. The dissolution and retirement of the partners took place as though the partnership was solvent; but in law, the concern itself not being equal, with its own assets, to the payment of its own engagements, the part-

(b) *Ex parte Williams*, 3 M. D. & De G. 433, 446.

(c) *Forster v. Lawson*, 3 Bing. 452.

nership was insolvent at this time, although the partners might have separate property sufficient to pay the joint debts, and the retiring partners must be taken to have known this ; but, nevertheless, either of them having been obliged to pay debts which the continuing partners had indemnified them against, would be entitled to prove, for the amount so paid, under a *fiat* against the remaining partners (*d*).

Change of Firm.—We may mention here a principle of the law of partnerships which it is very material for members of banking co-partnerships, at common law, to bear in mind, in order, in case of a change, by retirement or death, in the firm, that the position of the retiring partners may be properly secured.

The principle is thus laid down:—If a creditor receives interest from the new firm, for a debt due from the old one, this is not necessarily an adoption by him of the new firm as his sole debtors.

Thus, if the change is occasioned by death, and the creditor of the old firm receives interest for his debt from the new firm, it is quite clear this fact by itself will not discharge the estate of the deceased partner (*e*).

If the change is occasioned by the retirement of a partner, the same holds good. The following case is an instance in proof:—

A customer of a bank, consisting of three partners, has a considerable balance in his favour, for which he holds the accountable receipts of the firm. Then one of them retires, and the balance of the customer's account is brought forward into the concerns of the new firm, without, however, consulting the customer ; but he knew of the dissolution, and continued to deposit money in the bank after the new partnership commenced business ; for which

(*d*) *Ex parte Carpenter*, Mont. & M'A. 1.

(*e*) *Daniel v. Cross*, 3 Ves. 277.

new deposits he had the accountable receipts of the new firm sent to him from time to time; and each time that a balance was struck, the interest upon the whole sum, as well that part of it which was deposited before as that part which was deposited after the new partnership began, was calculated, as upon one aggregate sum without distinction, and he applied for and received at various times several sums, of such interest, from the new firm, calculated as just mentioned. Then the new firm became bankrupt; and upon the customer suing the retired partner for the amount of the balance due at the retirement, these circumstances were held, not to constitute sufficient evidence of the customer's assent to transfer the credit from the old firm to the new, and so adopt as his debtors the new firm, to the release and discharge of the old (*f*).

If, upon a change of the members, the balances of the customers of the old partnership be transferred from the books of the old firm to those of the new firm, without any special agreement as to the manner in which payments made by the customers were to be applied, but under a general understanding amongst themselves that the new house was to be responsible for the debts due from the old: the new house cannot appropriate payments made by customers, since the change, in their own favour, but will be bound to apply them in liquidation of the balances due from the old firm (*g*).

A., a partner in a banking-house, and also in business separately as a trader, dies, and in a suit by his separate creditors, against his executors, the bankers claimed to prove the balance due to them from A.; and they were held to be entitled to do so, although, as the partnership included A., they could not have sued him at law in his separate capacity; and the reason is, because, when an

(*f*) *Gough v. Davies*, 4 Price, 200. The retiring partner ought to have obtained a formal release from the customer.

(*g*) *Toulmin v. Copland*, 3 Y. & C. 625, thus applying the principle of *Clayton's Case*, 1 Mer. 608—610, 611, to cash accounts between partners themselves; *S. C.*, 7 Cl. & F. 375.

account is decreed the equitable creditors have a right to be satisfied, and no distribution of assets can take place until the accounts of all the creditors of every description have been gone into (*h*).

A corresponding principle applies also when the firm is changed by admitting new partners; and in such case also it has been decided, that if a banking firm make payments for a customer, professedly, and, as far as they were aware, with his authority: these payments being made to a person who was then acting as the customer's solicitor; but, in truth, these payments were made without authority; and they are debited to the customer in his account, and then the firm takes new partners, and the balance of the account is carried forward into the books of the new firm, but the old account is not closed, nor a new account opened, with the new firm: the new firm is not liable to the customer for the amount of such payments, unless there has been an agreement between the two firms and the customer that the new firm shall take upon themselves the actual liabilities of the old firm (*i*).

Firms as Customers.—With respect to dealings, by banks, with partnerships, as customers, it seems desirable to state here some of the cases of common occurrence, in the hopes that they may be found available, for the guidance of banks, in the management of their business.

Ashby and Rowland carry on business as partners, having an account with a bank in their own names. They then take one Shaw into partnership, without, however, giving notice to the bank, or altering the title of their account, and without making any rest in the account. The transactions at the banking house were with Rowland personally. The bankers never had notice that Shaw had been or was a partner, until the dissolution of the partnership, when notice, signed by Ashby and Shaw, was sent

(*h*) *Paynter v. Houston*, 3 Mer. 302.

(*i*) *Craufurd v. Cocks*, 6 Exch. 287.

them, that Rowland having withdrawn from the firm, no transaction to which he was a party could be recognized by them. Before Shaw became partner, Rowland had indorsed a bill of exchange, in the partnership name of Ashby and Rowland, to the bankers, who discounted it and placed it to the credit of the account. After Shaw became partner, and before the dissolution, Rowland indorsed two other bills in a similar manner, which were discounted, &c., as before. The balance of the account at the time of the dissolution, was 60*l.* 5*s.* 3*d.*, against the partnership. The proceeds of all the three bills were intended to be devoted, by Rowland, to other than partnership purposes, but of this the bankers had no knowledge, and nothing appeared that could have raised their suspicions of it. The question was, how far Shaw was liable to the bankers on these bills, and it was decided that he was not liable on the bill, which was indorsed and discounted before he came into the firm, but he was liable on the two other bills; for it was said that each partner might have limited the authority of his co-partners to bind him, by giving notice to the bankers; he was also held liable upon so much of the cash balance, as became due, after the day on which he became a partner (*k*).

A firm of partners agreed that one of the partners should retire, the assets being transferred to the continuing partners, who should take upon themselves the liabilities, and that the bankers of the firm (whose account is overdrawn), should release the retiring partner. The bankers sign a memorandum acceding to this arrangement. They cannot afterwards make the retiring partner a bankrupt, on the ground of this debt; for the partner having, by the agreement to which the bankers were parties, been induced to give up his share in the partnership property, and to denude himself of the means of payment of the debt, it is contrary to equity that they should be allowed

(*k*) *Vere v. Ashby*, 10 B. & C. 288.

to proceed, as if they had never caused him so to act; and they will be restrained, by injunction, from so proceeding (*l*).

One of two partners draws bills of exchange, *in his own name*, which he gets discounted by a banker, through the same agent, who obtained from the banker the discount of other bills, drawn in the partnership firm. The banker made no distinction between the bills, conceiving they were all drawn on the partnership account. The partners resided at Warminster, the banker carried on business at Salisbury, and was not acquainted with them. The proceeds were remitted, by the above-mentioned agent, and paid to the partnership account, and applied to the partnership use. But this circumstance was held to make no difference; the only party liable for the bills drawn by the one partner was that partner; the bills, considering the transaction as a discount, were his only; the partners, as such, had never said or done anything to induce the banker to believe it to be a partnership concern, and to lend his money on that account; and, in the absence of any express contract between the parties, it was treated as a mere discount of the bills; the money advanced being advanced solely on the security of the parties whose names were on the bills, and as a matter of discount, not as a loan, to the partnership. The banker never considered himself as lending money to them on the security of the bills, as he had never made any entry in his books, charging them as his debtors. His discounting the bills amounted, therefore, to a purchase of them (*m*).

If a single joint speculation be set on foot between A., B. and C., who are not general partners, and each is to contribute his third part, not of the capital, for no joint fund is raised for the speculation, but of the expenses; and A. was always ready with his advances, and paid his proportions when called upon, A. is not liable to the bankers

(*l*) *Attwood v. Banks*, 2 Beav. 192.

(*m*) *Emly v. Lye*, 15 East, 7.

of B. (who were also the bankers of the joint speculation), for monies advanced by them on the individual credit of B., without the knowledge of A., though such monies were applied in payment of bills accepted, payable at the house of their London correspondents, and drawn upon B., in the course of the transactions belonging to the joint speculation (*n*).

In a case like this, the bankers, when the real relation between the parties is known to them (which was not the case in the above instance), ought, for their own security, to ascertain and to be satisfied, that, in paying bills, &c., they are advancing money, not only for the use of *all*, but also with the knowledge, and at the instance of *all*, otherwise *all* will not be liable to repay the money; for the bankers will not be able to represent themselves as having been deluded, by the prospect of having a joint or partnership security; nor will they be able to say, "we relieved you from a liability by the payments we made, and have, therefore, a right to look to you for repayment;" for one person cannot pay the debt of another, and by that means make the other his debtor, unless the payment be made at the request of the other (*n*).

Articles of partnership were entered into between A. and three other persons, by which A. had power, if he died before the termination of the partnership, to bequeath a part of his share to one of his sons, &c. A. died, having bequeathed this part to such of his sons as his wife should appoint, and making his wife and two of the partners executors.

During A.'s lifetime the partnership borrowed money of their bankers, and deposited as security the title deeds of real estate belonging to the partnership. At A.'s death a large amount was due to the bank: A.'s sons were minors; the banking account was continued without alteration; A.'s capital was continued in the concern of the partnership, which some time afterwards became bank-

(*n*) *Smith v. Craven*, 1 C. & J. 500.

rupt, being greatly in advance with the bank. However, the amount which they had paid in, since A.'s death, exceeded the sum due to the bank, from A. and his partners *at that time*, and it was considered, therefore, to be clear that this discharged the lien of the bank, on the estate of the firm above mentioned, and operated as payment of the balance due to them at the death of A., against whose estate, therefore, they retained no claim whatever (*o*). The effect of the arrangement entered into at A.'s death, by the surviving partner and the bank, being interpreted to be that the account should go on as it had gone on before, not between the bank and the surviving partners, but between the bank and the new firm: the result was, the bank took the new firm as their debtors, and the new firm had paid off and discharged the whole of the debt that was due by A. (*o*).

Where a partnership keeps an account with a banker, and a new partner comes into the firm, he cannot transfer a part of the assets of the old firm to his separate account, without the authority of the firm, so as to discharge the banker (*p*).

A partnership, consisting of A. and B., trading under that name and style, is largely indebted to their bankers; B. dies, and A. continues the business under the same name and style, and afterwards indorses several bills of exchange to the bankers in the partnership name and style; A. then becomes bankrupt: the bankers were allowed to prove for the amount of these bills, against the separate estate of A., notwithstanding it was urged, that the circumstances furnished an inference that the bills were indorsed in respect of a partnership transaction (*q*).

Another partnership, consisting of two persons, Cross and Cheshire, had a joint account with their banker, in the partnership name; Cheshire had also a private account

(*o*) *Fearenside v. Derham*, 8 Jur. 633, 639; *Bank of Scotland v. Christie*, 8 Cl. & F. 214; *Bank of Scotland v. Watson*, 1 Dow, 43.

(*p*) *Ex parte Hanson*, 18 Ves. 231.

(*q*) *Ex parte Wilson*, 3 M. D. & De G. 57.

with him. In December, 1846, the banker applied to Cheshire for 268*l.*, as being the amount of the balance against the firm: Cheshire wrote in reply, saying that the balance arose from a debt of his own, and had nothing to do with the partnership account. In October, 1847, Cheshire gave the banker a promissory note for the above sum, being the balance still due. This note having been dishonoured, and Cheshire having become bankrupt, the banker sued Cross, who was compelled to pay the amount. Cross was held to be entitled to sue Cheshire for this sum, as money paid to Cheshire's use; the jury having found the debt, for which the promissory note was given, to be his own, and not to be connected with the partnership accounts (*r*).

When one partner borrows money from bankers, in the ordinary course of commercial transactions, on bills of exchange, whereby he pledges the partnership, without any knowledge in the bankers that the transactions are separate transactions, the partnership is liable; and the mere circumstance, that all the money so raised is carried into the books of the borrower, does not alter the case (*s*).

It is true that if the paper purporting to be the paper of the partnership was taken by the bankers, under circumstances to advertise them of the nature of the transaction, that it was not intended to be a partnership proceeding, *ex grâ.*, if it was taken for an antecedent separate debt of the partner, *primâ facie* it would not bind the partnership; but it nevertheless will bind them if previous authority from, or subsequent approbation by, them can be shown (*t*).

The fact of one of two partners having opened an account with a bank, in his own name, is not conclusive to show the account to be opened in his own behalf merely. The banker may prove that the customer was acting as agent of the partnership, and that the account was a part-

(*r*) *Cross v. Cheshire*, 7 Exch. 43.

(*s*) *Per Lord Eldon, C., Ex parte Bonbonus*, 8 Ves. 540.

(*t*) *S. C., id.*

nership account. On the other hand, the mere circumstance of the money deposited, being partnership money, is not sufficient to prove the account to be a partnership account (*u*).

The fact of one of many co-adventurers in a mining concern, who has assumed the management of the adventure, opening an account with a bank, in the name of the adventurers, does not show that he is expressly authorized by them to do so; and as there is in general no implied authority in mining adventures, by which any one of them may pledge the credit of the rest for money borrowed, although for the purposes of the mine, if the account is overdrawn, the bankers have no remedy for the balance by action against the co-adventurers (*x*).

A. and B., partners in trade, keep a joint account with a bank, B. having also a separate account with them. The partnership having overdrawn their account, B. dies, and A., as surviving partner, becomes bankrupt: at the time of B.'s death the account against the partnership was 15,000*l.*, but B.'s private account gave a balance of 400*l.* in his favour. It was held, that the bankers had a right in equity to go immediately on the separate estate of B., but they had not the right to retain against the executors, who had commenced an action against them to recover the balance due to B.'s separate estate (*y*).

A firm of two partners has an account with a bank, which shows a balance in their favour at the time of the death of one. Then the survivor draws out a portion of the sum owing to the firm, placing it in the hands of trustees, for the completion of a previous arrangement entered into for partnership purposes, upon the understanding, that if the arrangement went off the money should be returned; the arrangement does go off, and the surviving partner becomes bankrupt, the money still remaining in the hands

(*u*) *Cooke v. Seeley*, 2 Exch. 746.

(*x*) *Rickett v. Bennett*, 4 C. B. 686.

(*y*) *Stephenson v. Chiswell*, 3 Ves. 566.

of the trustees. It is part of the joint estate of the two partners, not of the separate estate of the survivor. This case illustrates, if illustration be needed, the relation of the bankers of a firm to the surviving partners: money due to the firm, in the bankers' hands, is the money, not of the survivor alone, or of the survivors jointly, if there are more than two partners in the original firm, but of the survivor and the representatives of the deceased partner (z).

It is always essential for the bankers to ascertain who are the true members of the firm to whom they give credit, and to be able to show, either that there is an *actual* partnership subsisting between any body or number of persons to whom they have given joint credit, or that the parties held *themselves* out as being in partnership, or jointly responsible as partners (a).

Notice.—In case of a joint-stock banking company, the fact of one of the directors of the company being one of a firm dealing with the bank, is not notice, actual or constructive, to the bank, of a change in the firm, by the retirement of one member. In case the bank had been an ordinary partnership, it would have been otherwise (b).

With Companies.—There may be cases in which bankers may make advances to the directors of a joint-stock company, on their personal guarantie, who have, by the constitution of the company, no power to borrow; namely, where the money is advanced, not for the payment of debts of the company, but for the purpose of carrying on the business of the company in its ordinary course; for, in such case, although the advances do not constitute a debt due from the company to the bankers, yet the directors, being trustees, and in that character entitled to indemnity, from their *cestuis que trustent*, against expenses *bonâ fide*

(z) *Ex parte Leaf*, 4 Deac. 287.

(a) *Pott v. Eyton*, 3 C. B. 32.

(b) *Powles v. Page*, 3 C. B. 16; *S. P.*, *In re Carew*, 31 Beav. 39.

incurred, will be allowed for such expenses on winding up the affairs (c).

Where the directors of a trading company incurred a large debt to the bankers of the company beyond the capital subscribed, they were decided to be entitled to be repaid by the company by means of a call with simple but not compound interest, or with rests, as charged by the bankers (d).

(c) *Ex parte Chippendale*, 4 De G., Mac. & G. 19.

(d) *In re Norwich Yarn Company*, 22 Beav. 143.

CHAPTER XIV.

BANKRUPTCY OF BANKERS AND CUSTOMERS.

BANKERS are found to be concerned in so many cases of bankruptcy of customers, as to make it appear expedient to collect the law and decisions thereon, so as to present the whole in a form and arrangement which, it is hoped, may prove useful to those who are called upon to advise with bankers in these emergencies.

By the 12 & 13 Vict. c. 106, s. 65, bankers are expressly declared to be traders liable to the bankrupt laws.

Bankruptcy of Bankers as such.—All persons, it would appear, are to be deemed bankers who act as such, although they may not keep banking houses (*a*); such are army and navy agents.

But a member of a joint-stock banking copartnership cannot be made a bankrupt in respect of the debts or liabilities of the company (*b*).

With respect to what is a sufficient absenting from the banking house, to constitute an act of bankruptcy, in a case of a bank in which there were three partners, and one of the partners, who resided on the spot, and was the only partner who transacted the business, the others residing at a distance, absented himself from the banking house, shut it up, and stopped payment: it was held, that this was not evidence of a joint act of bankruptcy by all three (*c*).

With respect to acts of bankruptcy arising on sales of property, the rule seems to be taken to be, that a trader

(*a*) *Ex parte Wilson*, 1 Atk. 218; see 2 Rose, 210, 211, and Cowp. 747, 750, 751.

(*b*) *Davison v. Farmer*, 6 Exch. 242; and 12 & 13 Vict. c. 106, s. 65.

(*c*) *Mills v. Bennett*, 2 Rose, 269; 2 M. & S. 566.

may sell his stock in trade or other property without such sale being taken as an act of bankruptcy, provided the object and effect be to enable him to carry on his trade: on an emergency he may sell *all* his property for that object; and this a bank, on which there is a run, may do (*d*).

Where bankers went on receiving deposits and issuing notes, after they were aware that their affairs were in a state of utter hopeless insolvency, they were refused a certificate on their bankruptcy, though the Court, on the consent of the assignees and opposing creditors, might grant them protection (*e*); and now, under similar circumstances, the Court of Bankruptcy would suspend or refuse their order of discharge, under 24 & 25 Vict. c. 134, ss. 157—159 (*f*).

Evidence of dishonest Dealings.—It appears to be assumed, that the failure of a banker is, *of itself*, evidence that he has been acting dishonestly. The customers of a banker have a right to look to him for the exercise of cautiousness and circumspection, for undeviating adherence to the purest good faith, and strictest integrity, in the use of their money which they have lent him as a banker; they have a right to expect that he will confine his trade to its legitimate field, viz., of discounting bills and purchasing or advancing money upon proper securities.

It is what Equity technically denominates fraud if a banker, in making a statement of the liabilities on cus-

(*d*) See per Erle, J., *Bittleston v. Cooke*, 25 L. J., Q. B. 289; 6 El. & Bl. 309.

(*e*) *Ex parte Rufford*, 21 L. J., Bank. 32; 2 De G., Mac. & G. 234.

(*f*) We may here notice the position of a person who gratuitously tenders assistance to a bank on the occasion of a run upon it, in respect of its notes. A. went to the banking house, on a run, and told the holders of notes, who were waiting for payment of their notes, that he had come to the resolution to support the bank with 30,000*l.*; with which the holders then present were satisfied and went away. He afterwards signed the following paper:—"I hereby authorize B. to assure the inhabitants of P. and its vicinity that I do hereby undertake to be accountable for the payment of the notes issued by the M. bank as far as the sum of 30,000*l.* will extend to pay." The bank having afterwards stopped payment, it was held that A. was not liable on this undertaking in an action by an individual holder who had taken the notes after notice of such undertaking but before the stoppage; *Phillips v. Bateman*, 16 East, 356.

tomers' accounts to a person who is negotiating to become a partner in the firm, undertakes those liabilities, though the banker himself may have been in total ignorance of the real state of affairs (being deceived by a clerk), and the partnership contract entered into on the faith of the truth of this representation will be set aside (*g*).

It is the duty of a banker (at least, if he takes part in the affairs of the bank, attends to business, and is not a dormant partner) to know what is in the books, so that for any misstatement as to the state of the bank, when the books show a different state of things, he will be responsible (*h*); and if a partner who attends the bank occasionally, though he does not interfere with the customers, and so is not a sleeping partner, but who is bound to know the real state of the bank, misrepresents that state, whether wilfully or in ignorance, to a person who, acting on the faith of such assurance, suffers loss, the partner is personally liable, as much as if he had known what he stated to be false.

But allowing a partner, without giving security, greatly to overdraw his private account with the bank, especially if such partner is a managing partner; permitting unnecessary litigation, and charging the expenses to the assets of the bank; wrongful dealing, by way of transfer, pledge, or any kind of conversion, with a customer's short bills, or other security; failure to keep a profit and loss account, were formerly elements of consideration for the Court of Bankruptcy, on the question whether a certificate should be granted, and would now be grounds for opposing or suspending an order of discharge under the 24 & 25 Vict. c. 134, ss. 157—159 (*i*).

Proving against Bankers in Bankruptcy.—As to what parties, and in what capacities, they are entitled to prove

(*g*) *Rawlins v. Wickham*, 28 L. J., Chanc. 188.

(*h*) *Rawlins v. Wickham*, 28 L. J., Chanc. 191.

(*i*) *In re St. Albans Bank*, 1 Fonb. 84. On appeal, the refusal of a certificate in this case was confirmed on the ground of the misconduct, as to pledging the short bill, without going into the other parts of the case; *Ex parte Sturt*, 4 De G. & S. 49.

against bankers on their bankruptcy, some few points may be stated by way of endeavouring rather to show the view which the Courts have taken with reference to the particular circumstances, than to extract any rule upon the subject.

If a father, who is one of a banking firm, from time to time transfers sums of money to the credit of a son, who has an account with the bank, and does this under circumstances excluding the idea of contemplated bankruptcy having been the motive for his conduct, the son may prove for the amount standing in his account, to his credit, at the time of the bankruptcy of the firm (*k*).

A banker in London has branch banks in Edinburgh and other places; his branch bank of deposit at Edinburgh is managed by an agent, Blyth; the banker stops payment, and the same day sends letters by post to Blyth and his other agents, informing them of the fact and directing them to discontinue business. Before the letter or other notice of the bankers having stopped payment reaches Blyth, a customer pays to Blyth three bank notes of an Edinburgh bank for 100*l.* each, five promissory notes of another banking company, and some silver, in all 305*l.*, for the purpose of having the amount remitted to London, to be paid to the banker to the order of the Edinburgh customer; but, after the news reaches Edinburgh, and whilst the notes are still in Blyth's possession, gives Blyth notice not to part with them, and they remain in his hands when the *fiat* issues against the banker. Blyth had a lien on the funds in his hands, and the assignees allowed him to retain the above sum in part satisfaction of it; but they were obliged to refund the amount to the customer (*l*).

A partner in a bank drew out part of a balance, standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unautho-

(*k*) *Ex parte Skerratt*, 2 Rose, 384.

(*l*) *Ex parte Cunningham*, 3 M. D. & De G. 58; *Ex parte Belcher*, *id.* 87.

rized security (*m*). On the bankruptcy of the bankers, the *cestuis que trustent* were held to be entitled to prove for the whole of the balance without giving up the mortgage (*n*).

Executors had a balance in that character in the hands of their bankers, who, with the consent of the executors, invested part of it on securities of an improper description for an investment by executors. The bankers made no inquiries as to the power of the executors to make the investment; but, had they have done so, the information would not have necessarily shown that the executors were guilty of a breach of trust: on the bankers becoming bankrupt, it was held, that they had not so participated in the breach of trust as to entitle the *cestuis que trustent* to prove against their separate estates (*o*).

But when the trustees of a settlement, which only authorized investments in government or real securities, advanced part of the trust fund to a banking firm in which one of the trustees was a partner, on the security of some mortgage bonds, in which some of the bankers were obligees, and afterwards another partner of the bank was appointed trustee of the settlement, and on the bankers becoming bankrupt: it was held, that there was a breach of trust on the part of the new trustee, constituting a proveable debt against his separate estate (*p*).

A. was co-partner with B., C. and D., in a banking firm, and was partner in another banking firm, with B. and C.; then A. died, and E. is admitted a partner in the first-mentioned bank *only*. Each firm becomes bankrupt, and by an order of the Court the estates of the two firms are consolidated. A person, who had become a creditor of the first-mentioned bank, in A.'s lifetime, received a

(*m*) 3 De G., Mac. & G. 218.

(*n*) *Ex parte Biddulph*, 3 De G. & S. 587.

(*o*) *Barnewall, Ex parte*, 6 De G., Mac. & G. 801.

(*p*) *Geaves, Ex parte, In re Strahan*, 8 De G., Mac. & G. 291.

dividend out of the consolidated estate ; but that was held not to have released A.'s estate (*q*).

A., residing in Canada, was in the habit of drawing bills of exchange on bankers at Hull, and remitting to them bills accepted by his different customers, to whom he had consigned cargoes. The bankers became bankrupt, at which time there were in the hands of holders for value bills to a large amount drawn by A. and accepted by the bankers ; but the bankers had misappropriated the greater part of the bills remitted to meet them, and these bills were all dishonoured : held, that A. could not claim to have returned to him such of the remitted bills as remained in the hands of the bankers at the time of their bankruptcy, but that they must be applied so far as they would extend in payment of the bills accepted by the bankers (*r*).

At the time of the bankruptcy of S. & Co., bankers, in London, one Harrison had an account with them. The commission issued against the bankers on the 21st of December, 1825. Some time before the 5th of December, 1825, one Hippines had been induced to accept, for the accommodation of Harrison, two bills of exchange, drawn by Harrison on Hippines, in favour of Harrison ; one of these was dated 22nd October, 1825, payable at four months ; the other, dated 1st November, 1825, payable at four months ; both were indorsed by Harrison on the 5th of December, 1825, and on that day he discounted them, together with three other bills of exchange, making in the whole the sum of 2,907*l.* 8*s.* 4*d.*, with S. & Co., and the amount of the whole number of bills was carried to the credit of Harrison in his account, and he was debited with the discount thereof. Between that day and the bankruptcy, Harrison drew out considerable sums by cheques. The three last-mentioned bills had been negotiated by the

(*q*) *Harris v. Farwell*, 13 Beav. 403.

(*r*) *Ex parte Carrick, In re Harrison*, 2 De G. & J. 208.

bankers previously to the bankruptcy, the two others remaining in the possession of the bankers at the time of the bankruptcy, at which time, also, there was a cash balance due from them to Harrison to the amount of 1,500*l.*; after the commission, Harrison paid the three bills above mentioned.

The assignees of S. & Co. claimed to be entitled to sue Hippins on the two bills, and to negotiate the same; but the bills were ordered to be delivered up to Harrison in part discharge of the cash balance, with liberty to prove for the difference against the estate. The assignees, it was considered, could not be allowed to proceed against Hippins, who was, in effect, a surety, for the purpose of defeating the right of set-off, which Harrison, the principal, would have had if the action had been against him (*s*).

The following case may, perhaps, not unfitly, obtain a place here, in illustration of the effect of the bankruptcy of bankers upon the relations of their customers:—A. buys goods of B., and, both having accounts with the banking-house of Caldwell & Co., of Liverpool, gives him, in payment, an order on Caldwells, dated 7th February, 1793, directing them, two months after date, to give to B. a bill of exchange, at two months, for the price of the goods; which order was indorsed by B., and paid by him into Caldwells, who entered it short in B.'s account. The general course of business between Caldwells and most of their customers was to settle accounts on certain quarterly days. When they advanced bills for the accommodation of their customers, or received bills for them, the course was to enter the whole amount in the bank books as bills; but on the quarterly days Caldwells debited his customers with the whole amount of the bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would fall due, and they credited the customers for the whole amount of bills

(*s*) *Ex parte Hippins*, 2 Glyn & J. 93.

paid in by them, debiting them for interest in like manner; and when an order or a cheque was paid in for a bill to be drawn on a future day, they calculated and allowed interest on the next quarterly day, to the time when such bill, if drawn, would become payable. It appeared that the account of B. had been settled only six times between May, 1789, and March, 1793, but that each of these settlements took place on a quarterly day. On the 18th of March, 1793, Caldwells became bankrupt (after which, of course, they could not give a bill), a quarterly day having intervened between the payment of the order into the bank and the bankruptcy, but upon this last-mentioned quarterly day no settlement of accounts took place between the bankers and B. The amount of the order was never carried out as cash, nor was any calculation of interest thereon ever made until after the bankruptcy. When the order was paid in there was a balance in favour of B., on his account, of 51*l.* 11*s.*, but the account was much overdrawn before the bankruptcy, without any other addition having been made to the credit side of the account, beyond the order in question.

On these facts the Court held that the order did not amount to payment, and that in an action by B. against A. for goods sold and delivered, it was not competent to A. to prove, by the bankers' books, that, at the last-mentioned quarterly day the account between him (A.) and Caldwells was settled, at which time he was debited with the whole amount of the order, and credited for interest thereon, from the day of the settlement, to the day when the bill, mentioned in the order, if drawn, would have become due.

Now, it was obviously material for the buyer to make out that a settlement had taken place, before the bankruptcy, between the sellers and the bankers, for that would have changed a transaction, which was only a bill transaction, into a money transaction. But the order did not amount to payment, because, on the facts, the Court was

of opinion that the seller of the goods had never accepted it as payment. The evidence was not admissible, because, although similar evidence was admissible, and was admitted to show how the account stood between the seller and Caldwells, inasmuch as it was an essential part of the transaction, and arose as much out of one side of the case as out of the other, the seller being bound to show what had become of the order given to him for the goods; yet, though the buyer and Caldwells had had a settlement, and the former had agreed to be accounted debtor to the bankers for the amount of the order, the seller was not acquainted that he had acquired this new credit in the books of the bankers; and the bankers, if called upon in consequence of this agreement between the buyer and them to pay the amount to the seller, might have answered—"It is true we have admitted the buyer to be our debtor for the amount, but what use can you, a third party, make of that agreement?" The bankers, therefore, could not have been charged by the sellers, and therefore the evidence, which would have been of no avail, if admitted, was properly excluded (*t*).

Fraudulent Preference.—The following transaction has been looked upon as doubtful, whether it amounted to a fraudulent preference or not:—

An army agent was in the habit of advancing money to his customers on their pay and pensions; this he did by cheques on his bankers. He overdrew his account with his bankers, and agreed, in consideration of new credit, to pay over to them, as he received the funds that come to his hands half-yearly from Government, for the discharge of pensions: this arrangement was not known to the authorities who issued these monies. The army agent then, unknown to his bankers, commits an act of bankruptcy, and, having subsequently received some government monies, paid them

(*t*) *Brown v. Kewley*, 2 B. & P. 518; *Bolton v. Richard*, 6 T. R. 139.

over, in pursuance of the arrangement, being indebted to the bankers in more than the sum paid over; and though it was admitted on all sides, that if the sums were put into the bank merely to enable the bankrupt to go on in business for a time, they were not payments in fraud of creditors: yet it was not denied that the jury might, on the facts, and the course of dealing, after the new credit, have inferred a previous contract or engagement; but a payment made, after an act of bankruptcy, in compliance with a previous binding contract, was not a fraudulent preference of the creditor paid (*u*).

But when a country bank, being in failing circumstances, and having suspended payment, and who, a few days afterwards, became bankrupt, handed over to a partner of a London banking house, their correspondents, certain cash, bills and notes, part of them in the expectation that assistance would be given, and part without such expectation, but without any intention of undue preference, and without any contemplation of bankruptcy at the time; both were held to be recoverable by the assignees, as money had and received to their use (*x*), part as being a fraudulent preference, and part as being delivered in the hope of receiving assistance, which had never been rendered.

Messrs. Oke & Snow, bankers in the country, being in want of funds to meet an expected run upon their bank, obtained from their friends a written guarantie for 2,000*l.*, upon the strength of which Messrs. Glyn & Co., bankers in London, advanced to the country bankers 2,000*l.* The guarantie was signed by the sureties upon the understanding, with Messrs. Oke & Snow, that the money should be returned if they found themselves, notwithstanding the advance, unable to meet the run. Messrs. Glyn knew nothing of this understanding, and Mr. Snow, one of the firm, having received from Glyn & Co., at London, the

(*u*) *Vacher v. Cocks*, 1 B. & Ad. 145.

(*x*) *Simpson v. Sikes*, 6 M. & S. 295; see *Gibson v. Muskett*, 4 M. & G. 160; *Gibson v. Bruce*, 5 *id.* 199.

2,000*l.* in notes and gold in a box, took the money down to the banking house and saw his partner, and finding that it was impossible to meet the run, they discussed the propriety of returning the money. While discussing the matter they received a letter from the sureties to the effect that, as the case was hopeless, they could not honourably retain the money, and that it ought to be returned; and afterwards, in an interview, the sureties again urged upon them to return the money. The box containing the money was accordingly returned unopened. The country bankers suspended payment; the next day afterwards became bankrupts: it was held, under the circumstances, that the return of the money was not purely voluntary, and did not amount to a fraudulent preference (*y*).

Bankruptcy of Customers.—Bankers have been shown to be liable, at the suit of a customer, if they fail to comply with his orders; *ex. gra.*, if they fail to apply monies, paid to them for the purpose, to the payment of bills, accepted by him, and made payable at their bank. So, if the customer becomes bankrupt before commencing the action, his assignees may sue the bankers, and recover damages, and the sum which they recover they may retain against the holders of the bills, who will be reduced to prove against the estate for the amounts of the bills (*z*).

If bankers receive and pay money on account of a bankrupt, after notice of his bankruptcy, they cannot set off the payments against the receipts; for as every man is bound to know the law, they must be taken to have known—that a bankrupt is not a free agent, and has no longer the disposition of his property: that they were not bound to honour his cheques in favour of creditors; that by so doing they were doing an illegal act, and were assisting in committing a fraud on the rest of the bankrupt's creditors, who were not the payees of the cheques; the spirit and

(*y*) *Edwards v. Glyn*, 2 El. & El. 29; 28 L. J., Q. B. 350.

(*z*) *Ex parte Sparkes*, 1 Fonb. 51; see *Moore v. Bushell*, 27 L. J., Exch. 3; *Farley v. Turner*, 26 L. J., Chanc. 710.

intention of the bankrupt laws being an equal distribution of the effects of the bankrupt among all his creditors. Therefore, the assignees will be entitled to recover from the bankers the whole of the sums received by them on account of the bankrupt after the bankruptcy, without any deduction for the payments, to whatever amount, made to his orders; which being made illegally, and besides, in their own wrong, fall as a loss upon the bankers (*a*).

A customer pays in bills of exchange to his bankers, and becomes a bankrupt. The bankers prove, in the first place, for the whole balance due to them from him, and afterwards some of the bills are paid to them in full by other parties liable on the bills; some before, and some after, the dividend is declared. Under these circumstances, the proof will be reduced by the amount of the paid bills; the dividends must be refunded, so far as they relate to those bills (*b*).

If a bankrupt, after an act of bankruptcy, of which his bankers had notice, though not the act of bankruptcy on which the petition was founded, draw upon them cheques in favour of creditors, which are paid by the bankers, they will not be admitted to prove for the amounts of them (*c*).

So, if bankers, with a knowledge of an act of bankruptcy of a customer, take a guarantie from a surety for him, to secure, to a given amount, *all sums then or thereafter to become due* from the customer, and the surety having had no notice of the act of bankruptcy, afterwards pay the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied: the payment will be appropriated in reduction of that portion of the bankers' debt which was, and not of that which was not, proveable (*d*).

(*a*) *Vernon v. Hankey*, 2 T. R. 113; 3 Bro. C. C. 313.

(*b*) *Ex parte Hornby*, 1 De Gex, 69.

(*c*) *Ex parte Sharpe*, 3 M. D. & De G. 490; *Bamford v. Burrell*, 2 B. & P. 1; 12 & 13 Vict. c. 106, s. 165.

(*d*) *Ex parte Sharpe*, 3 M. D. & De G. 490.

Debts proveable.—A holder of an unpaid cheque has no equitable claim on the banker on whom it is drawn, and cannot prove on his estate for the amount of it, upon his bankruptcy (*e*).

A customer, at the time of his bankruptcy, is indebted largely to his bankers; they are made bankers to his assignees: they then become bankrupts; their assignees cannot draw a dividend, under the customer's bankruptcy, until they have accounted for the whole, which the bankers have received, as bankers to the assignees of the customer (*f*).

The long-settled practice establishes that a country banker, whose usage it is to discount bills, charging 5*l.* per cent. interest, and commission, at the rate of 2*s.* 6*d.* per cent. per month, for the time the bills had to run, may prove in bankruptcy for the amount of the bills, *together* with interest and commission (*g*). And where the bankers carried on business at Faversham, and discounted bills for the bankrupt, before the bankruptcy, which bills were drawn by him upon, and accepted by, persons resident in London, so that there was nothing to be done, except merely writing to the bankers, their correspondents in London, where and through whom the money on the bills was paid: that was held by Lord Eldon to be a case within the rule (*h*).

On the other hand, in case of the bankruptcy of the bankers, their assignees are entitled to recover, in like manner, from the customer, or for the interest on the balance against the customer, both for the time that it has been against him previously to the bankruptcy, and for the time since elapsed (*i*). The bankruptcy did not make it less the duty, and it made it more the interest of the cus-

(*e*) Byles on Bills, 23 (8th edit.).

(*f*) *Ex parte Bebb*, 19 Ves. 222; *Ex parte Graham*, 3 Ves. & B. 130.

(*g*) *Benson v. Parry*, cited 2 T. R. 52; *Winch v. Fenn*, 2 T. R. 52, n.

(*h*) *Ex parte Jones*, 17 Ves. 332.

(*i*) *Pott v. Beavan*, 7 M. & G. 604.

tomers to discharge the debt, and he must make an equivalent for not having done so.

A. was indebted to bankers in 20,000*l.*, on the balance of his account. The firm agreed that if A. and another party, B., would give a bond for paying 10,000*l.*, by yearly instalments of 1,000*l.*, paying interest on any instalment which might be in arrear, the debt should be considered as reduced to 10,000*l.*, and cancelled. The bond was given. Before the first instalment became due, both the firm and A. became bankrupt, when the assignees of the firm claimed to prove against A.'s estate for the whole 20,000*l.* and interest. The proof, however, was rejected, on the ground that an additional debtor had been introduced by the agreement, and that, as the bond contemplated the falling into arrear of the instalments, and as none of the particulars of the agreement had been reduced into writing, the old debt must be considered to have been intended to be satisfied by the bond (*k*).

A firm of B. & Co., shipowners in the country, had dealings with K. & Co., bankers in London ; the course of dealing being, that B. & Co. drew bills on K. & Co., which they accepted, for the accommodation of B. & Co., who, in order to provide for the payment of these bills, remitted, to K. & Co., cash, and deposited with them bills payable to themselves (B. & Co.); the amount of these bills was received by K. & Co., and placed to the credit of B. & Co.'s cash account. Both firms became bankrupt in 1812 ; K. & Co. in July, B. & Co. in August ; there being, at the latter date, a large balance owing by B. & Co., to K. & Co., on their account ; K. & Co. being also liable, to a large amount, on the accommodation bills accepted by them for B. & Co., and having in their hands bills also to a large amount, deposited with them by B. & Co., to provide for the payment of such acceptances. Before any dividend was declared on the estate of K. & Co., their as-

(*k*) *Ex parte Hernaman*, 12 Jur. 643 ; 17 L. J., Bank. 17.

signees realized, from the deposited bills, more than sufficient to liquidate the cash balance due from B. & Co. The holders of the accommodation bills proved against both estates, and were fully paid, receiving ten shillings in the pound from each estate. The sum thus paid by the estate of K. & Co. exceeded, by above 6,000*l.*, the whole sum realized from the deposited bills. No debt was proved, or attempted to be proved, on behalf of the estate of K. & Co., against the estate of B. & Co., until 1847, when a further portion of the outstanding estate of B. & Co. was realized, but to an amount insufficient to pay twenty shillings in the pound to their creditors, exclusively of K. & Co.

On a claim made on behalf of the estate of K. & Co., the assignees were held to be entitled to prove the cash balance due by B. & Co., and also the 6,000*l.*, and that in respect of that sum, and until thereby that sum was repaid, they were entitled to the benefit of the proofs made against the estate of B. & Co., by the holders of the accommodation bills (*l*).

In the same case a principle was recognized, as of general application, which it may often be very material to their interests, for bankers who hold securities to be aware of, namely, a creditor holding a security is entitled to apply it in discharge of whatever liability of the bankrupt debtor he may think fit (*l*).

Bills deposited or discounted.—Bills deposited as security for advances, or for collection, or for other specific purposes, do not pass to the assignees of bankers, on their bankruptcy (*m*); but bills discounted generally do pass to their assignees.

So, if bills are indorsed to a banker in the country, in exchange for his bill upon his correspondent in London,

(*l*) *Ex parte Johnson*, 3 De G., Mac. & G. 218.

(*m*) *Ex parte Serjeant*, 1 Rose, 153; *Ex parte Barkworth*, 2 De G. & J. 194.

the property passes, although the latter bill is dishonoured, and trover will not lie for them against the banker's assignees (*n*).

If a trader, after an act of bankruptcy, draws a bill of exchange upon his bankers, which they accept for a sum, for which, in part, they hold security, but for the residue, accept, for the customer's accommodation, a party suing the bankers on the bill can only recover for so much of the bill as was accepted for the accommodation of the trader; for the rest the bankers will be liable, at the suit of the assignees (*o*).

A customer of a bank, who had been used to *deposit* with them bills of exchange and promissory notes, as security for advances, having got four bills accepted by A., for his accommodation, *deposits* them with the bank, to secure his floating balance; he then becomes bankrupt, when the bankers prove for a balance greatly exceeding the amount of the bills, *excepting them with others*, in their proof, *as securities*. They afterwards receive a dividend of two shillings in the pound, on the amount of their proof.

The bills were paid in full to the bankers, by A., and he was held to have a title (as a surety entitled to stand in place of the creditor proving) to call upon the bankers to refund the amount of the dividend of two shillings on the amount of the bills (*p*); for such a dividend cannot be treated as a payment generally, on account of the whole debt, but must be considered as a payment of part of each pound of the debt.

A customer indorses and pays into a bank, in the usual course of dealings, certain bills of exchange: these, in conformity with the usual practice of the bank, as regarded this customer's bills, are carried to the credit of the customer, and cheques are drawn by the customer, and payments made, from time to time; on the bills

(*n*) *Parke v. Eliason*, 1 East, 544; *Hornblower v. Proud*, 2 B. & A. 327.

(*o*) *Willis v. Freeman*, 12 East, 656.

(*p*) *Ex parte Holmes*, 4 Deac. 82; see *Bardwell v. Lydall*, 7 Bing. 489.

arriving at maturity, the customer is debited with the amount of those that were dishonoured. The balance of the account is struck every half-year; the customer becomes bankrupt; the bankers prove for the whole balance due; afterwards, some of the bills are paid in full, by other parties liable, some before, and some after, the dividend is declared. This renders it necessary to reduce the proof by so much, and refund the dividends to that extent(*q*).

A., B., C. and D. were four partners constituting a banking firm.

A customer, under an agreement with them, paid in bills of exchange, indorsing them, it being the arrangement that he should take out instead their promissory notes, they allowing him twenty-four days' interest on each bill paid in. On the 22nd of July, separate commissions of bankrupt issued against three of the bankers, B., C. and D. On the 23rd of July, the customer received from the bank, notes to the amount of 100*l.*; next day, he paid in two indorsed bills for 75*l.* and 70*l.* respectively, due on the 17th of August. On the 4th of August, a commission issued against A. On the 12th of August, the former commissions were superseded, for a joint commission against the firm.

Under these circumstances, it was held, that the assignees were not entitled to retain the bills(*r*) on the ground that the relation of debtor and creditor never subsisted prior to the bankruptcy, and that the consideration had failed, on which alone the bills were parted with.

Where bankers proved against a customer for their whole debt, as shown on the drawing account between him and the bank, and exhibited bills, deposited with them by him as securities, and then received the amount of some of the bills so deposited; the proof was ordered to be expunged, the bills remaining unpaid were ordered

(*q*) *Ex parte Hornby*, 1 De Gex, 69.

(*r*) *Ex parte M'Gay*, 2 Rose, 376.

to be sold, and a new proof to be made, deducting all that was received on account of the bills, considering them as mere pledges (s).

Mutual Credit and Set-off.—With respect to questions of mutual credit and set-off, in bankruptcy, it will be desirable to state the points, which most frequently arise, in the business of bankers.

The following case illustrates the principles governing these questions:—

A trader having obtained large advances from the Bank of Bengal, deposited Company's paper with the bank, as collateral security, with leave to them to sell, in default of his repayment of the loan, by a given day, paying over the surplus, if any, to him.

Before default in the repayment of the loan, he was declared insolvent under an Indian Insolvency Act, which enacted that when there has been mutual credit by the insolvent, and any other person, one debt or demand may be set off against the other, and that all debts, proveable in England, shall be proveable in India. In fact, the enactment is precisely similar to the 12 & 13 Vict. c. 106, s. 171, which regulates this subject in England.

At the time of the insolvency the bank also were holders, as indorsees of two promissory notes made by the trader, which the bank had discounted for him, before the making of the loan, and deposit of the Company's paper.

The time of repayment of the loan having elapsed, the bank sold the Company's paper, the proceeds of which, after defraying principal and interest, produced a considerable surplus.

The assignees of the trader brought an action to recover this surplus, when it was held that the bank had no right to set off the amount of the two promissory notes; this not being a case of *mutual credit*, within the Bankruptcy

(s) *Ex parte Baldwin*, cited 19 Ves. 230.

Act; because, although it has often been said to be the law, that where the one debt is immediately due, and the other only due at a future day, there is a mutual credit(*t*); yet, in all the cases which have so decided, it was certain that the party receiving the credit must, sooner or later, become debtor *in præsenti*; that a power was given over funds which the party giving could not revoke; then also the debt, in order to be set off, must be proveable, but the trader could not have proved for a contingent surplus (*u*).

The case would have been altogether different, if the bankers had sold the paper, and received the surplus, prior to the bankruptcy, then they would have been debtors to the trader, and so within the statute.

It is a well-known rule, that whoever takes a bill must be considered as giving credit to the acceptor; and whoever takes a note, credit to the maker. But what more particularly belongs to the subject of this treatise, is to call attention to a qualification which has been engrafted on the rule, involving matter of interest to bankers. That qualification is this, that the holder of a bill or note, in order to be entitled to the benefit, or to be within the enactment respecting mutual credit and set-off, must not be a mere agent holding the instrument for the benefit of other parties. The following instance may be useful, as an illustration of the proposition:—Maberly's assignees sued L. & Co., as acceptors of a bill for 1,000*l.*, drawn by the Commercial Bank, and indorsed to Maberly. At the time of Maberly's bankruptcy, L. & Co. had in their hands a bill for 700*l.*, drawn by a firm in which Maberly was a partner, accepted by a firm in which he was also a partner, and indorsed by the Commercial Bank. This bill became due on the day on which Maberly stopped payment, on which L. & Co. protested it, and having in their hands

(*t*) *Ex parte Prescott*, 1 Atk. 230; *Smith v. Hodson*, 4 T. R. 211; *Rose v. Hart*, 8 Taunt. 499.

(*u*) *Young v. Bank of Bengal*, 1 Deac. 680, H. L.

sufficient assets of the Commercial Bank to discharge it, debited the company with the amount, and sent them the protested bill, with the receipt for it. The Commercial Bank sent back the bill, requesting L. & Co. to set off its amount against their own acceptance for 1,000*l.*; and the question was, whether they had the right to do so. The decision was, they had not; for that L. & Co. were not creditors of Maberly, but held the bill for 700*l.* as agents, or mere trustees, for a foreign house, and as such had no right to set it off against a demand made on themselves in their own right (*x*). The rule is established, to insist upon demands, in respect of which set-off is claimed, being shown to be *in the same right* (*y*), in cases of solvent parties; but in cases under the bankruptcy laws, the principle adopted is not quite the same (*z*).

It follows, from the authorities cited, that there is no mutual credit when securities have been deposited, for a particular purpose, with bankers, by a customer, whose account is overdrawn, or to whom the bankers have lent money (*a*).

Set-off.—A trading firm was indebted to a country banking copartnership, consisting of three partners, called the Tweed bank, on the balance of their banking account, when the bank stopped payment. On that day, and the day following, the firm received from customers certain 5*l.* notes of the bank, in part payment of *antecedent* debts, on condition that they were to debit themselves, with so much only, on account of the notes, as they should receive from the assignees in respect of the notes. These notes were received by the firm, without notice of any act of bankruptcy by the bankers, and before any docket had

(*x*) *Belcher v. Lloyd*, 10 Bing. 316; see *Foster v. Wilson*, 12 M. & W. 191; *Fair v. M'Iver*, 16 East, 130; *Pollard v. Ogden*, 2 E. & B. 459.

(*y*) *Gale v. Luttrell*, 1 Y. & J. 180; *Baillie v. Edwards*, 2 H. L. Cas. 74, is not an exception to the principle.

(*z*) *Forster v. Wilson*, 12 M. & W. 203.

(*a*) See *per Parke, B.*, *Alsager v. Currie*, 12 M. & W. 751.

been struck. They also received, during the same day on which the bank stopped payment, certain other of the bank notes, from persons not debtors to them, for which they were *to pay* only so much as they should receive from the assignees in respect of them.

In an action brought by the assignees to recover the amount of the balance against the firm on their account with the bank, it was decided that the firm had a beneficial interest in the notes of the first class, and were, therefore, entitled to set them off against the claim of the assignees; but that, as to the second class, they held these merely as trustees for others, and were not entitled to set them off. It was not disputed that notes which they held as having received them before the bank stopped payment, in *bonâ fide* payment of antecedent debts, and for goods sold might be set off, without notice of any act of bankruptcy (b).

The law, it may be observed, is undoubted that a holder of country bank notes has a right to set off, in an action by the assignees of the bankrupt bankers against him, bank notes taken by him after the bank has stopped payment; provided, at that time, he has not notice of an act of bankruptcy, and that, notwithstanding that he took them for the very purpose of making them the subject of set-off, and, in substance, of getting 20s. in the pound upon them (c).

A customer's account with his bankers showed a balance in his favour on the day on which he became bankrupt. Previously to that, the bankers had discounted for the customer bills for a large amount, which were indorsed in blank by the customer, and two of them were paid by the acceptor before the bankruptcy; the others, much exceeding the amount of the customer's balance, did not become due before the 16th of November, the bankruptcy having taken place in the previous October. On the 2nd of November, the assignee commenced an action against the

(b) *Foster v. Wilson*, 12 M. & W. 191.

(c) *Hawkins v. Whitten*, 10 B. & C. 217.

bankers for the balance; on the 8th of November, the bankers proved against the bankrupt's estate for the whole of the bills, excepting the two which had been paid, and deducting the amount due to the bankrupt on the balance of his account, on which credit had been given to him for the amount of the bills discounted, and he had been debited with the amount of the discounts.

The transaction, as regards the bills, being considered to amount to a loan of money, and not a purchase of the bills, the bankers were held to be entitled as indorsees to set off in the action the amount of the bills not due.

Even, if a purchase of the bills had been made, it might either have been proved against the estate, or made the subject of set-off in an action (*d*). For a bill is proveable against the estate of the drawer before dishonour by the acceptor, and if proveable, then, by the terms of the statute, it is a debt, and may be set off (*e*).

The following is a case of set-off, *not* in bankruptcy.

Where the practice of a bank was to accommodate a customer, A., with a loan of 1,000*l.* upon the security of his promissory note, which was renewed every three months, the bankers upon these occasions discounting the note by placing the amount of it to the credit of A., as cash paid in by him, and debiting him on the other side of his account with the discount; each of these was considered not as one continuous loan, but as a separate transaction: and, therefore, the bankers having on the last transaction (the note having fifty-three days to run at the time of the death), entered it to the debit of A.'s account, allowing rebate of discount for the time it had to run, it was considered they could not set off the 1,000*l.* against the executor's claim before the fifty-three days were out, for the balance of A.'s account (*f*).

A question of very considerable importance, under this

(*d*) *Alsager v. Currie*, 12 M. & W. 751.

(*e*) *Starey v. Barnes*, 7 East, 435.

(*f*) *Rogerson v. Ladbroke*, 1 Bing. 93.

head, is, what is the character of a deposit of money made by a customer with his bankers, to meet a bill which he has accepted, payable there; is it a debt within the statutes of set-off, or, in case the customer's balance on his account is adverse, is there a mutual credit within the Bankruptcy Act? Now, it seems in accordance with the principles that have been laid down previously, and with reason, that when a customer deposits a sum of money for a specific purpose, and the banker receives it for that purpose, he should not afterwards be entitled to turn round and claim to set off the sum against money due to him from the customer; and so it has been decided: and the customer, or his assignees, upon his bankruptcy, may have an action if damage has resulted to the customer from the bankers' disobedience to his orders, in not applying the money deposited in payment of the bill; and in such action, being for unliquidated damages, no set-off is pleadable in answer (*g*), and the sum recoverable is the whole amount of the bill (*h*), or of the money placed in the bankers' hands, and misapplied.

The customer or his assignees, it must be remembered, might, if they had chosen, have treated the money when the bankers misapplied it as a debt, and sued for it in an action for money received, which would have enabled the bankers to have had the benefit of the set-off, but only in consequence of the form of the action, not upon the merits.

(*g*) *Bell v. Carey*, 8 C. B. 887.

(*h*) *Hill v. Smith*, 12 M. & W. 618.

CHAPTER XV.

THE RELATIONS OF SOCIETIES, PUBLIC BODIES, AND OF
PERSONS FILLING REPRESENTATIVE CHARACTERS TO
BANKERS.

QUESTIONS occasionally arise on the connexion in pecuniary matters between bankers and friendly and other societies, and public bodies, and also between bankers and trustees, executors, and directors of companies, which are, perhaps, not always readily capable of solution, by reference to the principles which have been shown to apply, when the question is between a bank and a customer, with whom they deal in his individual capacity. It will, therefore, be useful to refer to the decisions on this subject.

As Treasurers of Societies, &c.—The members of banks, individually or collectively, frequently undertake the duties of treasurers to societies, trustees, commissioners and other public bodies, and several decisions have been made pointing out their rights and liabilities in such cases, as well as where public bodies are mere customers, which it is necessary to state for their guidance, in assuming these offices, and in dealing with such bodies.

The first case we shall mention is one rather bearing on this subject, than one in which the bankers were regularly made the treasurers of the public body.

Where an enclosure act empowered certain commissioners to make a rate to defray the expenses of passing and executing the act, and enacted that persons advancing money to them should be repaid out of the first money raised; and expenses were incurred in execution of the act before any rate was made, the commissioners, to defray

these expenses, drew drafts on their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account *as* commissioners. The bankers for six years continued to advance considerable sums by paying these drafts.

It was held, that the commissioners were personally responsible to the bankers for these amounts (*i*).

Some paving commissioners make a banker their treasurer, without any written appointment. Their private act gave them power to sue, by their clerk, for any debt due from any treasurer, or other person *appointed* by the commissioners to receive money, or his assignees, in case of his becoming bankrupt with money of the commissioners in his hands, and that his assignees should pay such debt in full in preference to all other, except crown debts. Here it was held, that the commissioners might sue, by their clerk, the assignees, and recover the amount of their money in the banker's hands at the time of the bankruptcy of the banker; and also that the assignees were liable as standing in the place of the banker, for the whole of the produce of certain Exchequer Bills which the banker had received from the commissioners, and afterwards sold, without having paid over the produce before becoming bankrupt (*k*).

When one of the partners in a banking house was treasurer of a roads trust, and advanced to the chairman of the trustees, who applied to him for such advance by way of temporary loan, for the purposes of the trust, a sum of 2,000*l.*, which the partner placed to the credit of the trustees: it was held that, the money not having been borrowed on the credit of the tolls, as prescribed by the private acts relating to the trust, the chairman was personally liable (*l*).

The commissioners under an act of parliament for lighting and paving the city of Carlisle, were authorized, by

(*i*) *Eaton v. Bell*, 5 B. & A. 34.

(*k*) *Frost v. Bolland*, 8 D. & R. 384; *Dougan v. Bolland*, 5 B. & C. 622.

(*l*) *Parrott v. Eyre*, 3 M. & S. 857; 10 Bing. 283.

writing under their hands and seals, to elect and appoint a treasurer.

John Forster, one of the members of a banking house in that city, was nominated treasurer by an order of the commissioners, entered in their book of proceedings, and signed by the chairman; but the appointment was not made by any writing under the hands and seals of the commissioners, nor was Forster ever required to give any security under the act for the due execution of the office of treasurer. He continued, however, up to the time of the bankruptcy of the house, to act as treasurer, that is to say, that the collector of the commissioners paid all sums received into the banking house, but the cheques of the commissioners purported to be drawn on Forster individually as treasurer: they were not, however, presented to him, or paid by him, but by the banking house.

Under these circumstances the commissioners were not allowed to prove, for the monies which they had in the hands of the bankers at the time of the bankruptcy, against the separate estate of Forster, but only to come in as creditors against the joint estate of the firm (*m*).

Commissioners were appointed, by an act of parliament, for improving a harbour, and the navigation of a river running into the harbour; they were empowered to levy rates and duties on vessels entering the harbour, and also tolls on vessels navigating the river. A. and B. carried on business as bankers, and A. being appointed treasurer to the commissioners, the monies arising from the rates and tolls were paid to him, and were by him, from time to time, deposited in the banking house; the account of sums received in respect of the harbour was kept separate, by desire of the commissioners, from the account of sums received in respect of the river, and the cheques of the commissioners were headed accordingly, as the money was required, for the one purpose or the other. A. afterwards

(*m*) *Ex parte Dobinson*, 2 M. D. & De G. 341.

died, and no person being appointed treasurer in his stead, and B. carrying on the banking business alone, the monies of the commissioners were paid in as before; and, on the bankruptcy of B., it was held that a debt due from him on one of the accounts might be set off against a debt due to him on the other (n).

On the other hand, the following case illustrates the difficulty under which a trading firm may be placed by reason of a partner in the firm, who is also a commissioner, dealing with the funds of the partnership in the hands of bankers for the purposes of the commissioners:—

B. was a partner in the firm of B., M. & Co., and he opened an account with certain bankers in the partnership name, having no other account with them. B. was also one of a body of statutory commissioners, for lighting and paving a township; the commissioners banked with the same bankers, and their account was considerably overdrawn; but, upon their desiring a further advance, it was agreed between B. and the manager of the bank that an advance of 5,000*l.* should be made by the bank, B. saying by letter, “I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by the commissioners;” and the bank made the required advance, and subsequently there was a balance on B.’s account of 4,876*l.*, the extra advance not having been repaid. But when the partnership, B., M. & Co., sued the bankers to recover this sum, as money received to their use, they failed, because the money was specifically appropriated as a security for the additional advances (o).

Directors of Joint Stock Companies.—In dealing with joint stock trading companies, it is material for bankers, before they make advances, to ascertain whether the *directors* who represent the company, by the constitution of the

(n) *Ex parte Pearce*, 2 M. D. & De G. 142.

(o) *Brownrigg v. Rae*, 5 Exch. 489.

particular company, have power to borrow money ; if they have not, such advances will not, generally, be recoverable from the company as a debt (*p*).

The directors of a trading company, which was established before, but allowing the principle of limited liability, incurred a large debt to the bankers beyond the subscribed capital, but the money borrowed had been *bonâ fide* applied for the purposes of the trade of the company, and it was held that the bankers were entitled to be repaid the advance by means of a call upon the shareholders, with simple interest, or with rests, as charged by bankers (*q*).

Friendly Societies.—By the rules of a friendly society, which had been duly allowed, certified, confirmed, and enrolled under the Friendly Societies Acts, it was provided that there should be appointed a treasurer, or treasurers, in whose hands should be deposited all the cash belonging to the society, until the same could be placed out on interest upon satisfactory security ; and that, as soon as a sufficient sum should be collected, it should, after leaving in the club box a sufficient sum to pay the sick and other expenses of the society, be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank.

By the 12 & 13 Vict. c. 106, s. 167, it is enacted, that if any person appointed to, or employed in, any office in any society, established under any of the acts relating to Friendly Societies, and being entrusted with the keeping of the accounts, shall become bankrupt, the Court shall, on application of the society, order payment to be made to the society of all monies belonging to the society, and also payment of all monies remaining due, which the bankrupt received, by virtue of his office or

(*p*) *Ex parte Chippendale*, 4 De G., Mac. & G. 19 ; *Burmester v. Norris*, 6 Exch. 796.

(*q*) *Ex parte Bignold, In re Norwich Yarn Company*, 22 Beav. 143 ; 25 L. J., Chanc. 601.

employment, before any other of his debts are paid and satisfied.

Money belonging to a friendly society had been lodged with certain bankers, who afterwards became bankrupt, with a sum of 132*l.* 0*s.* 11*d.* of the society's monies in their hands, and this money they were alleged to hold, not as bankers of the society in the ordinary way of their banking business, but wholly as treasurers of the society. It was not alleged that the bankers had been appointed to be treasurers or officers of the society, but only that they were employed in the office as treasurers of and in the society.

A commissioner in bankruptcy having refused to make an order for payment in full of this sum, the Lords Justices dismissed with costs an appeal from his decision, considering the bankrupts not to have been employed in any office within the provisions of the Bankruptcy Act (*r*).

Savings' Banks.—With respect to the liabilities of bankers, as treasurers of savings' banks, the following instance may be useful:—

A. was appointed treasurer of a savings' bank, being at the time a partner in a banking house. The only account, between the institution and the banking house, stood in the names of the trustees of the savings' bank, who drew upon the banking house in the usual mode, as between banker and customer, by cheques, without any intervention on the part of the treasurer, who, except as being partner in the bank, never received or paid any money on behalf of the savings' bank. On his appointment, however, he entered into the usual bond, with a surety, and the trustees and treasurer, for twenty years, uniformly, in the annual returns represented to the Commissioners for the Reduction of the National Debt, that the last balance of the institution, for the time being, was in the hands of the

(*r*) *Ex parte Orford*, 1 De G., Mac. & G. 83.

treasurer in that capacity, and, therefore, represented it as being under the protection of 3 & 4 Will. IV. c. 14, s. 28 (one of the statutes relative to savings' banks at that time in force), and also under the protection of the Board.

At the end of the above period the banking firm became bankrupt: and it was held, that at that time the balance was in the hands of A., as treasurer, and might be recovered in full by the trustees of the savings' bank, out of his separate estate (s).

Treasurers of Corporations.—An incorporated company, authorized by a private act to appoint a treasurer from whom they were required to take security by bond, in a sufficient penalty, for the faithful execution, by such treasurer, of such office; Dilworth & Co., bankers, in partnership, were duly elected treasurers, and the members of the firm jointly and severally bound themselves in a penalty for the due performance of the duties, and also to pay all balances to the company, when thereunto required by the company. Dilworth & Co. afterwards became bankrupt, with a large balance belonging to the company in their hands.

But, notwithstanding, it was shown that the account was kept, in most respects, with the bankers as *treasurers*, and not as a banking account is ordinarily kept with a customer, yet, there having been no demand made by the company, to pay over the balance in the hands of the bankers, before the bankruptcy, and, consequently, no breach of the condition of the bond, the Court of Chancery held that the company was disabled, under the 6 Geo. IV. c. 16, s. 56, from proving against the bankers, *under the bond*, either jointly or separately (t).

A. was treasurer of a corporation, and kept an account as such with a banking company, of which he was a director and public officer; he cannot be heard to say that, in

(s) *Ex parte Riddell*, 3 M. D. & De G. 80.

(t) *Ex parte Lancaster Canal Company*, Mont. R. 44.

fact, the banking company is the treasurer of the corporation; nor has the banking company any lien for an overdrawn balance against the corporation, upon a particular fund belonging to the corporation, which has been paid into the bank to a particular account (*u*).

Trustees, Executors and others.—For the guidance of trustees, executors and other persons filling representative characters, in dealing with bankers, and *vice versâ*, it will be proper to state some principles, with brief illustrations.

If executors and trustees, under a will, having contracted to purchase land, sell out stock just before the time at which the purchase was to be completed, and deposit the proceeds, intending merely a temporary deposit, in the banking house with which the testator for many years had kept an account, and the principal clerk in which had been his confidential adviser in pecuniary affairs, they will not be responsible if the bank fails, with the deposit in its possession (*x*).

A., at his death, had about 2,000*l.* in the hands of his bankers, and his executors paid some monies which they had received on account of the estate, to their account at the same bankers, and drew out such sums as they required from time to time. About nine months after A.'s death the bankers became bankrupt, having, at that time, a balance of about 2,000*l.* belonging to the estate in their hands, and of which the sum of 1,000*l.* was ultimately lost by their bankruptcy. The Master, on a reference, found that there were not any purposes of their trust which rendered it necessary for the executors to retain the balance with the bankers, but the Court was of opinion that the executors were not answerable for the loss (*y*).

But it must not be too hastily concluded, that in all cases where no fraud or gross negligence can be imputed,

(*u*) *Attorney-General v. Corporation of Belfast*, 4 Ir. Chanc. R. 138, 162, 163.

(*x*) *France v. Woods*, Taml. R. 172.

(*y*) *Johnson v. Newton*, 11 Hare, 160.

agents and others are freed from responsibility. Thus, it has been held, that any agent (even an agent acting gratuitously) who pays money of his principal, even with knowledge of the principal, into his (the agent's) bankers, to his own account, there mixing it with his own monies, this last circumstance not being shown to be known to the principal, is liable, on failure of the bank (z).

So, an assignee of a bankrupt paying in money mixedly to his own account, without denoting it as money of the estate, in a separate account, is liable, on the bankruptcy of the bankers (z).

The rule generally applicable to dealings of trustees with banks has been sometimes put thus: if a trustee deposits trust money in a bank of *good credit*, he is exonerated if the bank fails with the money in its possession (a). But probably it would be difficult to assign any very precise meaning to these terms; and, in fact, the requirement seems to be, that the trustees should act with as complete *bona fides*, and, therefore, with as much circumspection and care as any prudent man would do in the transaction of his own business. Now, a person paying another's money, entrusted to his keeping, into a banker's mixedly with his own, cannot be said to act in the required manner; for the trust money thereby becomes liable to any set-off that the banker may have against the trustee: if the banker fails the *cestui que trust* is left without any mode of showing for how much he is entitled to prove against the bankrupt's estate: if the trustee fails, the whole of the sum which stands to the trustee's credit, in the banker's books, goes to the assignees: if the banker's course of business is to pay interest on money deposited, the trustee makes advantage of the *cestui que trust's* money, by having the interest credited to him; and, lastly, he obtains credit, from the largeness of the balance, in his favour, at his banker's; so that it has been held to be an employment of money in

(z) *Massey v. Banner*, 1 J. & W. 241, 248.

(a) *Belcher v. Parsons*, Ambl. 219; 1 Ld. Ken. 38.

trade, where the trustee was a person engaged in trading, and so deposited trust money (*b*).

By a decree made in an administration suit, a contract for the sale of property belonging to an estate was to be carried out by a trustee, but there were no directions given as to the payment or receipt of the purchase-money. The trustee, with the acquiescence of the solicitor of the testator, and others interested under his will, deposited the purchase-money in a private bank, at interest. The bank afterwards failed: it was held, that the trustee was not liable for the money so lost; and he would not have been liable even if the money had been deposited so as not to be repayable on demand (*c*).

An attorney paying in his client's money to his bankers to his own account, mixing it with his own, is liable, on the failure of the bank, to pay the whole to the client (*d*).

If an attorney, employed to get in assets in the country, and to remit the proceeds to town, procures a bill, drawn by a banker on his correspondent in London, but, by mistake, made payable to his order, so that it becomes necessary for him to indorse, he is not personally liable as indorser, either to the indorsee or to the bankers, with whom this bill may have been deposited for the purpose of presentment for payment (*e*).

A sole executor and trustee of personal estate of a testator, in trust for his widow for her life, and after her decease, to pay or otherwise divide the same in equal shares amongst his children, pays 300*l.*, part of the assets, into an old established bank at Chichester, who had for many years been his own bankers, with a direction in writing to invest the money in Consols in his name for the purposes of the trust. Instead of doing so, the bankers, without his knowledge, open a new account with him, in

(*b*) *Rocke v. Hart*, 11 Ves. 61; *Ex parte Hilliard*, 1 Ves. jun. 91; *Melland v. Gray*, 2 Collyer, 301.

(*c*) *Wilks v. Groom*, 3 Drew, 584; 25 L. J., Chanc. 724.

(*d*) *Robinson v. Ward*, R. & M. 274; 2 Car. & P. 59.

(*e*) *Kidson v. Dilworth*, 5 Price, 564.

which they give him credit for 300*l.*, the executor and another person, his partner, having a joint account with the bank in which no notice of the 300*l.* appeared. The executor, relying that the investment had been duly made, never called for the transfer note, or made any other inquiry, and remained in ignorance that the investment had not been made until the bankers became bankrupt, a period of nearly five months. The executor proved, for the 300*l.* under the *fiat*, and insisted that he was not bound to account for more than the dividend received, alleging that the employment of bankers was the necessary and only course available to a person resident in the country, to invest money in the government funds; but he was decreed to pay the whole 300*l.*, with interest at 4 per cent. (*f*).

Where a married woman and A. were appointed executrix and executor of a will, but the husband dissented from his wife's administering, and probate was refused to her, and the bank owed a balance to the testator and had securities of his in their hands, and paid the balance and delivered the securities to the feme covert without knowledge of the husband's dissent, or the refusal of probate, the bank was held to have a good defence to an action by A. to recover the same (*g*).

Payment by bankers to one of several trustees, of the proceeds of stock, sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless the one trustee be authorized by the others, or perhaps, unless to pay to one be the usual course of business (*h*). At law, when trustees all join in a receipt, *primâ facie* all are considered to have received the money (*i*); but executors not being bound to join in a

(*f*) *Challen v. Shippam*, 4 Hare, 555.

(*g*) *Pemberton v. Chapman*, 26 L. J., Q. B. 117; 7 El. & Bl. 210.

(*h*) *Stone v. Marsh*, R. & M. 364.

(*i*) *Brice v. Stokes*, 11 Ves. 319.

receipt, if they do, whether they are all liable will depend on their having acted (*k*).

A will contained the usual clause that the trustees should not be liable for any loss or damage which might happen without their wilful default, or by the misfeasance, failure or insolvency of any banker, with whom the trust monies might be lodged for safe custody or investment, or otherwise, in the execution of the trusts.

There were three executors and trustees of the will, one of them being the testator's brother, to whom a moiety of the residuary property was given over absolutely in the event of the testator's infant daughter dying under age, and unmarried. The trusts were to convert, with all convenient speed, such parts of the testator's personal estate as should not consist of money, and to invest the surplus in some parliamentary stock.

A banking house, which had been employed by the testator, continued to be employed after his death by the trustees as the bankers of the trust estate; the house failed, and the trustees were held to be personally chargeable with the loss of a sum of trust money, which they had allowed to remain an undue length of time in the bankers' hands, instead of investing it, and with which in their hands the bankers failed (*l*).

So, where executors advanced to their bankers part of the testator's assets upon the personal security of the bankers, who appeared to have given accountable receipt notes, bearing interest for the money, which was to be distinct from the general account current, they were held liable for the loss (*m*).

Payments by executor *de son tort* to a bank in satisfaction of debts owing to the bank by the deceased, in respect of an overdrawn account, such executor *de son tort* really acting at the time as executor, so that the

(*k*) *Joy v. Campbell*, 1 Sch. & L. 341.

(*l*) *Moyle v. Moyle*, 2 Russ. & M. 710.

(*m*) *Darke v. Martyn*, 1 Beav. 525; *Anon.*, Lofft, R. 492.

bank might reasonably suppose him to be rightful representative, are good, and the bank may retain them against the representative of the deceased (*n*).

Executors, being merchants and copartners residing at Limerick, had before and at the time of the death of their testator kept an account with Robarts & Co., bankers, in England, as their agents and correspondents, and, on his death, had opened another and separate account as executors: the executors being greatly overdrawn in account with the bankers, the latter determined to apply all the assets of the testator, which they had or should receive by virtue of the power of attorney given them by the executors for that purpose, to the satisfaction of the separate debt due from the firm to them; they accordingly sold out stock of the testator, and, instead of carrying the proceeds to the executorship account, they carried it to the mercantile account, and they then closed the executorship account, to the credit of which there was at that time a considerable balance in their books, the executors, having at the time full notice and knowledge, authorized the bankers by power of attorney to collect and receive the assets.

The bankers, remitting the amount to the executors in course of their duty as agents, and afterwards applying the assets in payment of the amount of such remittances, were not responsible in respect of the misapplication by the executors, they not being privy to any intention of misapplying the assets (*o*); and it seems that even if they had reason to believe that the executors were misapplying the money, they would still be bound to act as they did; at least they could not be responsible for paying over to the principals money placed in their hands for the purpose of being remitted to them (*o*).

The distinction seems to be this: if a banker, employed

(*n*) *Thompson v. Harding*, 2 El. & Bl. 630.

(*o*) *Keane v. Robarts*, 4 Mad. 332, 356; see *Davis v. Spurling*, 1 Russ. & M. 64.

to receive and pay over the assets of a testator, pay them over, so that they may be applied for the purposes of the will, he is not responsible for the executor's misapplication, but if, in dealing with the executor, he pays the assets for the private purposes of the executor, he is *particeps criminis*, in a breach of trust, and he is equally a party to the breach of trust, whether he applies the money to the debt or to the trade of the executor (*p*).

If bankers of trustees wrongfully sell out stock of the trustees, and apply it to their own purposes, the measure of their liability is the sum paid in replacing the stock (*q*).

If one of the banking firm sells the stock unknown to the partners, but under circumstances such that they might, by the exercise of proper diligence and attention have discovered it, equity will impute knowledge, and hold them all liable (*q*).

If one executor places the testator's money in the hands of the other, who happens to be a banker, so that the act is not an improvident act, the executor depositing is not chargeable in case of a loss, inasmuch as if he had been sole executor, and had under the same circumstances deposited at a banker's, he would not have been liable (*r*).

If three executors have an account in their names with a banker, and one draws a cheque, it seems the bankers may refuse to cash it, if they have received notice from *one* of the others, not to part with the money (*s*).

An executor placing money which he ought to have invested in his banker's hands, mixed with his own account, is liable for the amount on the failure of the banker (*t*).

Receiver.—A receiver under an order in Chancery is not liable for sums deposited with a banker in good credit, provided there is nothing to attach fraud, and no laches,

(*p*) See *per* Sir J. Leach, 4 Mad. 358, 359.

(*q*) *Sadler v. Lee*, 6 Beav. 324.

(*r*) *Chambers v. Minchin*, 7 Ves. 198; 2 Wms. Exors. 1552.

(*s*) *Gaunt v. Taylor*, 2 Hare, 413.

(*t*) *Fletcher v. Walker*, 3 Mad. 73.

(as if he has left the money an unwarrantable time in the banker's hands,) on the failure of the banker. In such a case a receiver will be liable, if he leaves money in the hands of his bankers, and receives interest upon the sums so deposited, and the bankers fail (*u*).

(*u*) *Drever v. Maudesley*, 8 Jur. 547.

CHAPTER XVI.

CRIMINAL LIABILITY OF BANKERS.

A CLEAR opinion was expressed by two judges in a case already referred to (*a*), that a banker, (notwithstanding that it was the usage of the county of Lancaster amongst bankers,) who negotiated bills entrusted to his care, knowing himself to be on the eve of bankruptcy, would run great hazard of incurring the penalties enacted in 52 Geo. III. c. 63, a statute passed to prevent the embezzlement of securities for money deposited for safe custody or for any special purpose with bankers. That statute is now repealed; but similar provisions were first substituted by the 7 & 8 Geo. IV. c. 29, ss. 49, 50, and by the 20 & 21 Vict. c. 54, which were subsequently consolidated in 1861 in one statute.

The consolidating enactment, 24 & 25 Vict. c. 96, s. 75, is as follows:—

As to Frauds by Agents, Bankers, or Factors.—Whosoever, having been intrusted, either solely or jointly with any other person, as a *banker*, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing, to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security for any purpose, or to any person specified in such direction, shall, in violation of good faith and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so in-

(*a*) *Thompson v. Giles*, 2 B. & C. 427, 434; and *ante*, 141, 146.

trusted, such money, security or proceeds, or any part thereof respectively; and whosoever, having been intrusted, either solely or jointly with any other person, as a *banker*, merchant, broker, attorney or other agent, with any chattel or valuable security (*b*), or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the united kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years, and not less than five years (by 27 & 28 Vict. c. 47, s. 2), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

But nothing in this section contained, relating to agents, shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal,

(*b*) By sect. 1, the term "valuable security" is defined to include any order, Exchequer acquittance, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state; or in any fund of any body corporate, company or society, whether within the United Kingdom or in any foreign state or country; or to any deposit in any bank, and also any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state; and any document of title to lands or goods.

in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any *banker*, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim or demand, entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.

By sect. 76, whosoever, being a *banker*, merchant, broker, attorney or agent, and being intrusted, either solely or jointly with any other person, with the property (c) of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor.

But by sect. 85, nothing in these sections shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency, and no person shall be liable to be convicted by any evidence whatever in respect of any act done by

(c) By sect. 1, the term "property" includes every description of real and personal property, money, debts, legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and not only such property as shall have been originally in the person or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any acquired by such conversion or exchange, whether immediately or otherwise.

him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any Court of Law or Equity, in any action, suit or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency.

And by sect. 86, nothing in these sections contained, nor any proceeding, conviction or judgment, to be had or taken thereon against any person under any of the said sections, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any offence against any of the said sections might have had if the act had not been passed ; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him ; nor affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

In a case of great importance and notoriety, in which certain bankers, Strahan, Paul and Bates, had fraudulently disposed of a number of Danish bonds, which had been deposited with them for safe custody, and for the purpose of receiving the dividends upon them for the use of their customer, who had deposited them, it was attempted to take advantage of the proviso contained in the 52nd sect. of the 7 & 8 Geo. IV. c. 29 (now repealed by the 24 & 25 Vict. c. 95, and similar to sect. 85 of the 24 & 25 Vict. c. 96, above referred to), by the bankers becoming bankrupts, and, after they had been arrested and imprisoned on the criminal charge, making a voluntary declaration in the Court of Bankruptcy as to the misappropriation of the securities : but the attempt failed.

They were indicted at the Central Criminal Court(*d*), for

(*d*) The trial took place October 26, 27, 1855, *coram* Alderson, B., Martin, B., Willes, J. Sessions Paper, 1854—1855, p. 695 ; 7 Cox, C. C. 85.

that, being bankers and agents to John Griffith, clerk, and being intrusted by him with certain bonds for safe custody without any authority to pledge or make away with them, in violation of good faith, did sell and convert the same to their own use and benefit.

Having pleaded not guilty, an application was made on their behalf for permission to plead double by adding a plea, alleging the fact of their having made the disclosure above mentioned, with a view of availing themselves of the 52nd section of 7 & 8 Geo. IV. c. 29; but the application being considered as resting on no authority, and made only to the discretion of the Court, was refused; and, as evidence was afterwards admitted for the purpose of bringing before the Court the steps which had been taken by the prisoners in this matter, it may perhaps be regarded as settled that, in future, any banker in like circumstances may avail himself of a defence similar to this to the criminal charge, under Not guilty, if at all; and that it is not necessary to plead it specially.

It was proved that the bankers had sold certain Danish bonds, and transferred others belonging to Dr. Griffith, a customer, who had deposited them with the prisoners, as his bankers and agents, for safe custody, and in order that they might obtain for him the dividends as they fell due, and that he had never given them any authority to pawn or sell the same or any part of them, and that he had never overdrawn his account with them.

For the defence, it was proved, that on the 17th of June, 1855, one Montague John Tatham filed a petition for adjudication in bankruptcy against the bankers; that they were adjudged bankrupts on the same day, and afterwards surrendered; that they made a statement concerning the disposal of the securities in question, without examination, and not in pursuance of any order of the sitting commissioner; and that they made this declaration for the general purpose of assisting the creditors, and for the special purpose of making a disclosure under the 7 & 8 Geo. IV. c. 29,

that they were then questioned by the solicitor for the *fiat* as to the truth of the statement, and each answered (affirming its truth) "Yes." The commissioner had, previously to this, refused an application by counsel on behalf of the bankrupts to be permitted to examine them with reference to the statement as to the disposal of the securities, saying, "If any creditor applies for the bankrupts to be examined, he can do so; but, upon the bankrupts' own application, I refuse it."

The bankers were convicted, and sentenced to fourteen years' transportation.

In a recent case (*e*), having a considerable bearing upon the points above determined, it appeared that an agent having been intrusted with a bill of lading, without the authority of his principals, and in violation of good faith, deposited the bill of lading with his bankers, for his own benefit, as a security for advances. He was charged with this offence before a magistrate. The depositions taken in support of the charge contained ample evidence to sustain it. Having afterwards become bankrupt, he was taken by his creditors and examined respecting the charge before a commissioner in bankruptcy, and he then made a statement in every respect in accordance with the evidence contained in the depositions. He was afterwards indicted on the same charge. On the trial, his examination in bankruptcy was tendered by his counsel as a defence, as showing that he had disclosed the act before the commissioner in bankruptcy previously to being indicted for the offence, and that, therefore, he was not now liable to be prosecuted or convicted: it was held unanimously by the Court of Criminal Appeal that this evidence of a disclosure was admissible under the plea of not guilty, but the majority of the Judges was, however, of opinion, that as the agent only stated before the commissioner matter which had been previously known, and previously proved before the magistrate, he had not made any disclosure within the meaning

(*e*) *Reg. v. Skeen*, 28 L. J., M. C. 91; 1 Bell, C. C. 97.

of the statute, and that, consequently, he was not entitled to its protection. The minority of the Judges, however, holding that, as the statement of the agent was obtained in the course of a compulsory judicial examination, instituted *bonâ fide* by the creditors for their own interest, it was a disclosure before the commissioner, notwithstanding the previous inquiry and publicity of the matter.

The liability affecting directors for making false reports of the solvency of their banks will form the subject of separate consideration.

CHAPTER XVII.

DISCOUNTS.

MUCH of the business of bankers consisting in the discounting of bills of exchange, it is necessary to state some points of the law as affecting this matter.

The rule has been stated, that if a person holding a bill of exchange delivers it to a banker to be discounted, or if, by the course of dealing between the customer and the banker, bills received by the latter, on account of the former, are considered by both parties as cash, *minus* the discount, so that the customer is at liberty to draw on the banker, as against those bills, beyond the amount of actual cash that may be standing to his account in the books, then, in the event of the bankruptcy of the banker, the assignees of the bankrupt are entitled to the bills. For where the banker discounts a bill for a customer, giving him credit for the amount of the bill, and debiting him with the discount, there is a complete purchase of the bill by the banker, in whom the whole property and interest in it vest, as much as in any chattels he possesses (*a*).

Therefore, discounting in this way makes the banker *the purchaser of the bill*.

If, however, a person discounts bills with bankers, and receives in part of the discount other bills not indorsed by the bankers, and these latter bills turn out to be bad, the bankers are not liable; for, having taken them without indorsement, the holder takes the risk on himself, inasmuch as the bankers, by not indorsing them, have refused to pledge their credit to their validity, and the transferee must be taken to have received them on their own credit only (*b*).

(*a*) *Carstairs v. Bates*, 3 Camp. 301.

(*b*) *Fydell v. Clark*, 1 Esp. 447.

On the other hand, a banker discounting a bill, whether for a customer or a stranger, there being no indorsement by the customer or stranger, and the bill not being given in payment of an antecedent debt, is a mere purchaser, and, on the bankruptcy of the acceptor, has no recourse against the party from whom he took it (c).

A manager of a banking company had permission to carry on his separate trade; as a trader, he dealt with the company on the terms usual between banker and customer, and being possessed of certain bills in his character of trader, drawn and accepted by firms of good reputed credit, he deposited them without indorsing them, and obtained an advance upon them, his account at the time being already slightly overdrawn; therefore, this transaction was a loan, not a discount, and upon the bankruptcy of the drawers and acceptors, the manager was held bound to make good the loss to the bank (d).

Bankers discounting a customer's bills at a time when his account is largely overdrawn, and the amount is carried to the credit of his account, are holders for value, though no money actually passed (e).

Presumption in favour of Bankers.—Such a degree of credit is given to bankers by the Courts, that *primâ facie* they will be taken to have discounted with good faith. Thus, where a clerk was sent by his master, a customer of a bank, to ask for discount for a bill, but with orders to tell them, when he asked for it, the particulars of an arrangement between the holder and the master, the Court would not presume that the clerk told the bankers (who discounted the bill) these circumstances, but, on the contrary, presumed that they *bonâ fide* discounted the bill, without notice of those circumstances, in the absence of proof to the contrary (f). But when A. fraudulently

(c) *Bank of England v. Newman*, 1 Ld. Raym. 442; 12 Mod. 241.

(d) *Watkin v. Campbell*, 1 Jur., N. S. 131.

(e) *In re Carew*, 31 Beav. 39.

(f) *Middleton v. Barned*, 18 L. J., Exch. 433.

obtained possession of the acceptances of B., and got them discounted, and carried to his account by a banking company to which he was largely indebted at the time, and of which he was a director and local manager, it was held that the bank had notice, and could not be considered *bonâ fide* owners because of their connexion with A. (g).

Negligence in Discounting.—Where bills are discounted before acceptance, many circumstances may throw the loss, if they are refused acceptance, upon the bankers.

Thus, where A., living at Wooler, in which place the bankers (carrying on business at Berwick) had also a branch bank, dealt with traders, residing at Wakefield, and had been used, on selling goods to them, to draw his bills on them, which he got discounted at the Wooler branch, whence they were transmitted to the bankers at Berwick, who sent them to Wakefield, to the traders, for acceptance; and they had been warned by the traders, in writing to inquire, on discounting any bills that A. might draw upon them, whether he had delivered the goods he valued for, and sent the carrier's receipts to them, assuring the bankers that, in that case, the bill would be accepted; and afterwards the bankers discounted a bill, and sent it for acceptance to the traders, who, after retaining it for ten days, saying they could not accept it, stating the invoice of the goods had not been sent, and, after detaining it sixteen days more, returned it unaccepted, the bankers having made no objection to their detaining it: and then A. stopped payment without delivering the goods, or sending the carrier's receipt to the traders; the bankers were held to have no claim upon the traders, the drawees of the bill, who had never accepted it.

The bankers were unaware of the insolvent condition of A., at the time they discounted the bill for him (h).

(g) *In re Carew*, 31 Beav. 39.

(h) *Mason v. Barff*, 2 B. & A. 26.

Effect of Bankruptcy on Discounts.—Palmer, having borrowed money from his bankers in Calcutta, deposited East India Company's paper with the bank to a greater amount than the debt, as a collateral security, and authorized the bank, in default of repayment of the loan by a given day, to sell the paper for reimbursement of the bank, rendering him any surplus. Before default in repayment of the loan he became insolvent: at the time of the insolvency, the bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them before the transaction of the loan and the agreement as to the deposit of the Company's paper. The time for the repayment of the loan having expired, the bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus.

In an action, by the assignees of Palmer & Co., against the bank to recover the surplus, it was held, that the bank could not set off the amount of the two promissory notes; and that the clause of mutual credit in the Bankrupt Act did not apply. For though the bank gave credit to Palmer for the notes they had discounted for him, there was no corresponding credit given by him to them; it was uncertain whether there would be any money coming to him or not; the credit was all on one side (*i*).

Bankers discounted for A., a customer, bills of exchange to a large amount, placing the amount to the credit, and the amount of the discount to the debit of themselves. A. became bankrupt, having at the time a balance at the bank in his favour of 179*l.* 19*s.* 11*d.* The bills were indorsed by the bankers in blank, and some of them were paid by the acceptors *before* the bankruptcy; the others, far exceeding in amount the above sum, did not become due till some time *after* the bankruptcy. Before they became due, the assignees commenced an action for money lent, to recover the balance, and subsequently, but still

(*i*) *Young v. Bank of Bengal*, 1 Moore, P. C. 150.

before the bills became due, the bankers proved against the bankrupt's estate for the whole amount of the bills, deducting the balance of 179*l.* 19*s.* 11*d.*

There was held, in this case, not to be any purchase of the bills, but only the ordinary discounting, or loan of money upon them. The bankers might have sued the bankrupt (before his bankruptcy) for money lent on them; they might have proved against him (after his bankruptcy) had the bills been dishonoured; and as a bill may be proved against an indorsee, just as against the drawer, previously to its being dishonoured by the acceptor, so the bankers were entitled, by the terms of 6 Geo. IV. c. 16, s. 50 (similar to the 12 & 13 Vict. c. 106, s. 171), to set off these bills in the action brought against them by the assignees, this being a case of mutual credit (*k*).

It is material to distinguish this case from the last: in that there was no mutual credit; the Company's paper was deposited for a particular purpose, and no credit was given for the surplus. Also, the duty of the assignees there was to redeem the paper immediately, and if they had done so, no debt whatever would have been due in respect of the loan. Here was a mutual credit, and the bankers being entitled to set off, the assignees could not prevent them having the benefit of it, by bringing the action too soon (*k*).

A partnership arranged with their bankers, so that the latter were to discount indorsed bills of exchange, to the extent necessary to meet such acceptances of the partnership, as were in course of immediate payment at the banking house. In order to meet certain acceptances of the partnership coming due, they remitted to the bankers an indorsed bill; these acceptances were, however, dishonoured by the bankers, who shortly after stopped payment. The bankers then procured the bill to be accepted, and made an entry in their books of their having discounted it; but as they had no right to discount the bill

(*k*) *Alsager v. Currie*, 12 M. & W. 751, 757, 758.

without performing the trust reposed in them, the title to the bill did not pass to their assignees, and the partnership must have it given up to them (*l*).

Specific Appropriation of Proceeds on Discount.—Bills are remitted to be discounted, the proceeds being directed to be applied in a particular way: the remittee did not get the bills discounted, but received the money on them when due. Before that time the remitters had stopped payment, having first desired to have the bills returned to them: they became bankrupt before the bills were paid to the remittee. The latter was held to be liable to the assignees to refund the whole of the money (*m*); and so bills remitted for sale, the proceeds to be applied to a particular purpose, remain the property of the remitters until the purpose is satisfied (*n*).

So, where a customer pays a sum of money into a bank, for the purpose of providing for particular bills, he being at the time indebted, on advances, to the bank to a larger amount, and they, instead of following his instructions, place the money to the credit of his account, and, consequently, the bills were refused acceptance, and whilst they remained unpaid in the hands of the holders the customer became bankrupt; his assignees recovered *the whole of the sum from* the bank (*o*).

A branch of the National Provincial Bank of England discounted for a customer a bill drawn by him, and accepted by A. B. This bill, which was for 365*l.*, was dated 17th January, and was at three months, and would consequently become due 20th April. On the 19th the customer brought another bill to the bank, for the same sum as the former, dated 18th April, for the purpose of retiring the former. The manager of the bank consented to retire the former

(*l*) *Ex parte Frere*, 1 Mont. & M'A. 263.

(*m*) *Buchanan v. Findlay*, 9 B. & C. 738.

(*n*) *Muttyloll Seal v. Dent*, 8 Moore, P. C. 319.

(*o*) *Hill v. Smith*, 12 M. & W. 618.

bill, but the course pursued was not strictly a retiring of the bill; for the course taken was, to send up to London the fresh bill, giving directions to their London agents to order payment of the original bill, which had been previously sent up to them by the manager. A. B. was credited in his account with the amount of the bill, 365*l.*, less the discount.

After some time, and various further transactions between A. B. and the bank had taken place, the bill of the 18th April proved to be forged, and was dishonoured.

Under these circumstances it was contended, in an action by the bank on the first bill, against the acceptor, that what had been done by the bank in regard to the first bill was equivalent to a payment of it, as they had given the drawer credit for the sum for which it was drawn, *less the discount*; but to this the Court did not assent (*p*).

Where a customer places in the hands of his bankers two bills for 1,000*l.*, indorsed by him for the amount of which it was agreed he should draw, the bankers having previously refused to discount them; and the customer only draws for 65*l.*, and the bankers employ a broker to discount the bills, and become bankrupt shortly after the bills were deposited, the customer is entitled to the proceeds of the bills (*q*).

Re-discounting.—A customer draws a bill, which is accepted, payable at his bankers'; he discounts it with the bankers, indorsing it to them; they re-discount and indorse to a third person.

On the maturity of the bill it is presented by the holder at the bank, along with other bills payable there, all indorsed by the bankers; all these were paid without any indication whether the bankers paid as indorsers or agents for the acceptors; the account of the acceptor of this bill was overdrawn at this time, and he stopped payment the same day.

(*p*) *Bell v. Buckley*, 25 L. J., Exch. 163; 11 Exch. 631.

(*q*) *Ex parte Edwards*, 2 M. D. & De G. 625.

Next day notice of dishonour was given by the bankers to the customer, and he was debited with the amount of it.

It was left to the jury to say whether the bankers paid as indorsers on their own account, or as agents of the acceptor. The jury found that they paid in the former character, which was tantamount to finding that the bill was dishonoured, and they had a verdict, and the Court held the bankers to have had a right to pay as indorsers, reserving to themselves time to inquire whether they would honour the bill or not, and that there was no obligation on them to inform the holder in what capacity they paid (r).

Accommodation Bills.—Where bankers discount for a customer, the drawer, a bill accepted for his accommodation, which is dishonoured, and after that event, have notice that it was an accommodation bill, and are requested by the customer not to apply to the acceptor, to which they assent, and afterwards the customer's account with them shows a balance in his favour to a larger amount than the bill, the bankers are bound to discharge the bill out of the balance, and cannot keep it as a security for the fluctuating balance which might ultimately become due to them, and, therefore, if they sue the acceptor they will be nonsuited (s).

It made no difference that after the balance had been in his favour, as above stated, the customer became greatly indebted to the bank, and failed before action (s).

Death of Drawee.—Bankers, having discounted for a customer who did not indorse a bill drawn by B. on A., another customer, and accepted by him, payable at the bankers' house, on the morning of the day in which it becomes due, wrote it off in his account to his debit, having at that time in their hands 1,421*l.* to the credit of A. The

(r) *Pollard v. Ogden*, 2 El. & Bl. 459; see *Attenborough v. Mackenzie*, 25 L. J., Exch. 244.

(s) *Marsh v. Houlditch*, Chitty on Bills, 283, n., 10th edit.; compare *Hammersley v. Knowllys*, 2 Esp. 665.

bill was for 467*l*. A. was at this time dead, but this was unknown to the bankers at the time they debited A.

The bankers were held to be entitled, when the bill became due, to reimburse themselves out of the acceptor's funds in their hands, having no notice of the death (*t*).

Conditional Indorsement.—The payee of a foreign bill of exchange annexed a condition to his indorsement before acceptance, thus, "Pay the within sum to Messrs. Clerk and Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date, R. Robertson."

The bill was drawn upon and accepted by Messrs. Kensington & Co., bankers, in London, but not till after it was indorsed by the payee, as above, and after it was indorsed by Clerk and Ross. There were several mesne indorsements, until it came by indorsement to the Bank of England, who discounted it. When the bill was at maturity, including the days of grace, the Bank of England presented it to Messrs. Kensington, by whom it was paid.

Robertson's name never having appeared in the Gazette as ensign in any regiment of the line, the condition of the indorsement was not performed; and, upon Robertson suing the acceptors for the amount of the bill, the Court considered him to be entitled to recover; because Messrs. Kensington & Co. had accepted after the condition had been superadded to the bill, and that condition had been superadded to the bill at the outset, and before it got into circulation, and the condition not having been performed, and the acceptance having been made with knowledge of the restriction, the property, in such case, reverted to the payee, who had a right to come upon the acceptors at maturity, just as if he had not indorsed at all.

Hence it follows, that such a bill cannot be safely discounted without ascertaining that the condition on which the payee indorses has been satisfied (*u*).

(*t*) *Rogerson v. Ladbroke*, 1 Bing. 93.

(*u*) *Robertson v. Kensington*, 4 Taunt. 30.

It has, however, been questioned whether it is allowable by the custom of merchants to indorse a bill of exchange with a condition which restrains the indorsee from indorsing over in a certain event (*x*).

Restrictive Indorsement.—At one time it was held, that a bill of exchange might be arrested at any period of its course of currency, or negotiability, by what was called a restrictive indorsement, *ex. gra.* thus,—“Pay to A. and no one else,”—or “Pay to A. only,”—or “The within must be credited to B., value on account,” &c., by which means it was considered the negotiability was stopped, so that A. or B. had neither of them any right to indorse the bill over; if, therefore, a bank discounted a bill with such an indorsement upon it, it did so in its own wrong, and the negligence involved in the act prevented the bank from recovering the money from the parties to the bill. Therefore, where a bill bore an indorsement in the third form of the above examples, and also a subsequent indorsement, purporting to be by B. “to C., or order,” and the bill was discounted by the Bank of England in the way of business, and the acceptor having absconded, a friend of the drawers paid the amount of the bill for the honour of the drawers, and as their agent, and afterwards, it having been found that the last-mentioned indorsement was a forgery, the drawers sued the bank to recover the amount of the bill, which had been paid by their agent, the bank was held liable to refund the money to the drawers, because, it was said, they ought to have taken notice that the negotiability of the bill was stopped or destroyed by the indorsement to B., and not having done so, must abide by the loss (*y*).

A restrictive indorsement is now, however, fully settled to have no power to stop the negotiability of a bill of exchange; for that a bill of exchange, originally made payable to a person named, or his order, is in its nature negotiable; and if it is afterwards indorsed with such words as,

(*x*) *Soares v. Glyn*, 8 Q. B. 24; 14 L. J., Q. B. 313.

(*y*) *Ancher v. Bank of England*, Dougl. 638.

pay to A. and him only, this transfers to A. the whole interest in the instrument, and that interest he may assign as he pleases ; any restriction or confinement of his power to assign is contrary to the nature of the negotiable character of bills, and therefore void. Therefore there is nothing in a restrictive indorsement to prevent the restricted indorsee from making any assignment of the bill so as to confer a title to the bill (z). The right of action, which the subsequent indorsee has, is, it is true, only for the benefit of the restraining indorser, or of the *cestui que trust*, as the case may be.

Hence the decision previously mentioned would be departed from at the present day ; for it turned upon the assumption that there might be an effectual restrictive indorsement *stopping* the negotiability of the bill ; from which it was held to follow, that the bank discounting such a bill, as in that case, could not have sued the acceptor, or other parties to it, and therefore, under the circumstances of the case, could not retain the money that had been paid in mistake on behalf of the plaintiff. Now, however, that the groundwork of the conclusion is overturned, the conclusion would be different ; that is to say, there is nothing to prevent a bank from discounting a bill which bears a restrictive indorsement to A., with a subsequent indorsement by A. to some one else, or order, and from being able to recover in such case as well as in any other case of discount.

If, however, a person uses words to show that the restrictive indorsement was made to the restricted, as the agent, or mere servant of the indorser, and that he never was intended to take an interest in the bill ; thus, a bill of exchange is indorsed by the payee to A., who indorses to B. thus,—“ Pay to B., or his order, for my use,” and B.

(z) *Murrow v. Stuart*, 8 Moore, P. C. 267. This decision is the more material to be known, as it expressly overruled the contrary doctrine laid down both in Bayley on Bills and Byles on Bills. There is no difference in this respect between bills of exchange, whether foreign or inland, and promissory notes. 2 Burr. 1224 ; see *Gay v. Lander*, 6 D. & L. 78.

discounts the bill with his bankers, who, without inquiry, do so, and apply the proceeds of the bill to the use of B.: the property in the bill is held to remain in A., who may sue the bankers (a).

This, therefore, seems to be the law on the subject: a restrictive indorsement cannot be made to have the effect of stopping or destroying the negotiability of a bill of exchange; but an indorsement may be made on a bill in such a way as to show the indorser not to have intended that his indorsee should take any interest of his own in the bill or its proceeds,—that he is nothing more than the hand to receive the proceeds,—in such case, if the latter discounts with a bank, they must see to the application of the money which they pay to the restricted indorsee, on account of the bill (it is said); and the purpose is to prevent a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. But such an indorsement does not prevent the indorsee from receiving the money from the acceptor when the bill becomes due. To the objection, that it cannot be expected that bankers, when asked to discount such bills, should look into the accounts between the principal and his agent, it is admitted that it cannot be expected that they should, but still if they take a bill so indorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.

In the case from which these principles are taken, the Court would only say that such an indorsement constituted the *restricted* indorsee a trustee for the restraining indorser; they expressly avoided the question, whether if he indorsed over, *all* the subsequent indorsees would be trustees for that indorser; but it seems they did consider the bank who advanced money on the bill to the restricted indorsee to be bound to inquire into the state of the accounts between him and his indorser, so as to see whether he was

(a) *Sigourney v. Lloyd*, 8 B. & C. 622, where the restricted indorsee had indorsed over to the bankers.

indorsing for the benefit of himself or his indorser. In this case the account between the restraining indorser and his indorsee was in favour of the former, to the amount of more than 3,000*l.*, exclusively of the bill, which was for more than 3,100*l.*; but, on the morning of the day when the discount was made, the balance of account of the indorsee with his bankers was upwards of 3,700*l.* in his favour; in the course of the day the balance became largely against him. The bill was paid at maturity, and the bankers received the amount of it.

The bankers were held liable to the restraining indorser, in an action for the money had and received on account of the bill (*b*). It is to be observed, that the bankers, in this case, were, in a manner, parties to the application of the money, contrary to the indorser's intention, for being the bankers of the restricted indorsee, they, themselves, applied the proceeds to his account with them.

Acceptances per Procuration.—So an acceptance "*per proc.*" is an express notice to a person taking the bill, that the authority of the agent is limited, and, consequently, a banker who discounts the bill cannot maintain an action against the principal, if the agent has exceeded his authority (*c*).

Indorsement per Procuration.—An indorsement of a bill of exchange, "*per proc.*," is an express intimation that the person indorsing professes to act under an authority from some principal, and imposes upon an indorsee, or a banker discounting the bill upon the faith of such indorsement, the obligation of ascertaining that the person so indorsing is acting within the limits and terms of his au-

(*b*) *Sigourney v. Lloyd*, 8 B. & C. 622. Mr. Justice Story (on Bills, s. 511, 4th edit.) says expressly, "Every subsequent holder must receive the money subject to the original designated appropriation; and if he voluntarily assents to or aids in any other appropriation, it will be a wrongful conversion thereof, for which he will be held responsible." The decision was affirmed in the Exchequer chamber. 5 Bing. 524; 3 Y. & J. 220.

(*c*) *Stagg v. Elliott*, 12 C. B., N. S. 373; 31 L. J., C. P. 260.

thority; and, consequently, if the indorsement is wholly unauthorized by the principal, the banker will not be entitled to recover against the indorser (*d*).

Agents.—An agent applied to a banking company on several occasions to discount bills drawn by his principal, and at the commencement of the transactions with them informed them who the drawer and acceptors were of a bill which he applied for discount of, and they agreed to discount it without requiring the agent's indorsement. Several subsequent discounts took place under the same circumstances; but upon some of the bills offered, they required and obtained the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly unaware.

The agent became bankrupt, and it was held, there being nothing to show that the agent had not handed over the proceeds of the bills to the principal, or that those proceeds could be recalled, that the banking-house could not prove upon the bills which the agent had not indorsed (*e*); for although an agent may pledge his credit, so as to be liable upon a bill, though he do not indorse (*f*), yet the mere fact of an agent procuring a bill to be discounted for his principal creates no liability on the agent's part (*g*).

Bankers' Commission.—With regard to commission, it seems obvious, and has been expressly laid down, that a banker is as well entitled to his commission for his trouble in transacting money negotiations, as a factor, for his trouble in effecting sales; commission is a lawful charge, provided it is reasonable and usual (*h*), this last fact being

(*d*) *Alexander v. Mackenzie*, 6 C. B. 766; 18 L. J., C. P. 94.

(*e*) *Ex parte Bird*, 4 De G. & S. 273.

(*f*) *Jones v. Ryde*, 5 Taunt. 488.

(*g*) *Stead v. Thornton*, 3 B. & Ad. 357, n.

(*h*) *Curtis v. Livesey*, cited 4 M. & S. 197; *Ex parte Gwyn*, 2 Deac. & C. 12; *Winch v. Fenn*, 2 T. R. 52, n.

a question for the jury (*i*). Commission may also be charged for the trouble of obtaining the acceptance and payment of bills (*k*).

Interest.—When a mortgage of land is made by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance, that it has been partly composed of interest, turned into principal by rests and interest on that interest, according to the course of dealing between a banker and his customers. In other words, the balance due is to be ascertained by reference to the course of dealing between the banker and customer, and having ascertained the amount, the only burden fastened on the land is this balance. Also, such balance was allowed to carry interest at 5*l.* per cent. per annum, but no more (*l*); but *now* there is no objection, in the absence of fraud, to any rate of interest which may be agreed on, for the 17 & 18 Vict. c. 90, has abolished the laws against usury.

When the account between a banker and his customer is kept at compound interest, and the customer dies, the final balance at his death, in the absence of any agreement to the contrary, carries no interest (*m*). So when the balance is in the favour of the customer, and the banker dies, or ceases to carry on business, or becomes bankrupt (*m*). A banker's account with his customer was kept at compound interest. In 1847, the customer gave his bankers a security on land, and other property, for all monies then due or thereafter to become due, "with interest for the same, after the rate of 5*l.* for every 100*l.* by the year." In 1855, the customer assigned all his estate to

(*i*) *Masterman v. Cowrie*, 3 Camp. 488; *Carstairs v. Stein*, 4 M. & Selw. 192; *Hammett v. Yea*, 1 B. & P. 144.

(*k*) *Baynes v. Fry*, 15 Ves. 120.

(*l*) *Rufford v. Bishop*, 5 Russ. 353; see *Lord Clancarty v. Latouche*, 1 Ball & B. 420; and *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Chanc. 756; as to the mode of taking bankers' accounts.

(*m*) *Crosskill v. Bower*, 32 Beav. 86; 32 L. J., Chanc. 540.

trustees for the benefit of his creditors, and his banking account ceased: it was held, that under this security the bankers were entitled to compound interest down to the date of the execution of the creditors' deed, but afterwards to simple interest only (*n*).

When a mortgage security is given by a customer to his bankers for a fixed sum, and not in respect of a running balance, the banker is not entitled to include that sum in the banking account, and charge compound interest (*o*). Bankers had a mortgage security and a banking account with their customer: it was held, that in ascertaining the amount due between them, the accounts must in the first instance be taken separately, and on different principles (*o*).

(*n*) *Crosskill v. Bower*, 32 Beav. 86; 32 L. J., Chanc. 540.

(*o*) *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Chanc. 756.

CHAPTER XVIII.

BANK OF ENGLAND.

Deposits and Discounts.—The Bank of England is largely engaged as a bank of deposit and of discount; and in such cases, nearly, if not altogether, the same rules apply to its regulations, and as regards its relations to customers, as have been stated in respect of banking establishments generally. The Bank of England in its trading capacity is in the same position as an ordinary bank. Therefore, where a customer was in the practice of making his acceptances payable at the Bank of England, and, in a particular instance, an acceptance of his was presented at a quarter after nine, and left till eleven o'clock, A.M., and then refused payment for want of assets, and being afterwards, at six, P.M., presented again by a notary, was again refused payment by a person stationed by the bank, although the bank, before six o'clock, had received sufficient assets to cover the bill; it was considered that the bank was not liable, as for negligence, at the suit of the acceptor, in dishonouring his bill, because the second presentment took place after banking hours (*a*).

The Bank of England does not, as a general rule, receive deposits repayable with interest (*b*).

Branch Banks.—The 7 Geo. IV. c. 46, s. 15, empowers the Bank of England to appoint agents to carry on their business at branch establishments in any place in England.

(*a*) *Whitaker v. Bank of England*, 1 C. M. & R. 744.

(*b*) Recently, in September, 1864, the bank allowed interest at the rate of 5 per cent. on a large sum of money which the Metropolitan Board of Works was bound by Act of Parliament to keep at the bank, as an extraordinary exception.

A notice of an act of bankruptcy given to the bank in London, in time for communication to be made to the branch banks, will be sufficient to bind the bank in respect of transactions with the bankrupt at any of these branches (c). But each branch is to be treated as distinct for the purpose of giving notice of dishonour of a bill of exchange (d).

By the same statute, notes or bank post bills issued at any branch are payable in coin there, as well as in London, but when issued in London, they are not payable at the branch banks (e).

Bank of Issue.—The privileges of the bank, as a bank of issue, will be treated of separately (f).

Proving in Bankruptcy.—The Bank of England being a body politic and incorporate (g), may prove in bankruptcy by an agent, provided the agent, in his declaration, declares that he is such agent, and that he is authorized to make such proof (h). For this purpose, the agent is usually authorized by a power of attorney under the seal of the bank (i).

A., being a separate trader, was also a partner in a firm of B., C. and A. The firm indorsed a bill of exchange to A., who discounted the bill with the Bank of England, (with whom he kept an account in his own name,) indorsing it to them. The bank was aware of the partnership of B., C. and A.

On their bankruptcy, it was contended for the bank, that its practice required the customer's indorsement of the bill, for the purpose of additional security to them, and

(c) *Willis v. Bank of England*, 4 A. & E. 21.

(d) *Brown v. London and North Western Railway Company*, 4 B. & S. 337.

(e) *Willis v. Bank of England*, 4 A. & E. 38.

(f) See *post*, Chap. XX., "Banks of Issue," and Chap. XXI., "Bank Notes."

(g) 5 & 6 Will. & M. c. 20, s. 20.

(h) 24 & 25 Vict. c. 134, s. 144.

(i) *Ex parte Bank of England*, 1 Swanst. 19; *Naylor v. Mortimore*, 10 Jur., N. S. 1001, 1003.

that therefore they were entitled to prove, both against the joint estate of the firm, and the separate estate of A. But Lord Eldon, C., was of opinion, that the practice of the bank did not vary the nature of the bill, for it substantially was a joint and several security. The proof was, therefore, confined to an election between the joint or the separate estate. In all cases in which the holder has been allowed to avail himself of his security to the full extent, there has been either an ignorance of the partnership, or a subdivision of them, into distinct trading establishments (*k*).

Agent of the Government.—The Bank of England is the banker or agent of the Government for the management of the National Debt (*l*), and the Bank of Ireland acts in a similar capacity in regard to the public debt of Ireland (*m*). The unredeemed portion of these debts is represented by stock and terminable annuities, transferable at the Bank of England and at the Bank of Ireland, with interest payable half-yearly.

Stock in the Public Funds.—The nature of stock and money in the Public Funds is this: stock is a chose in action; it has no locality, except for the purposes of probate and administration; it does not fall under the head of goods and chattels, so as to pass by a grant of *bona et catalla felonum* (*n*); it has been said neither to be a chattel, nor to have any resemblance to a personal chattel (*o*); it cannot be sued for as money (*p*), it does not pass under the term “money,” in a will (*q*); but it does pass under

(*k*) *Ex parte Bank of England*, 2 Rose, 82.

(*l*) 24 Vict. c. 3, fixes the rate of remuneration which the bank receives annually for the management of the unredeemed public debt.

(*m*) By 8 & 9 Vict. c. 37, s. 3, the Bank of Ireland is to manage the public debt of Ireland, and pay the dividends without expense to the government.

(*n*) *Rex v. Capper*, 5 Price, 217.

(*o*) *Wildman v. Wildman*, 9 Ves. 119.

(*p*) *Nightingale v. Devisme*, 2 W. Bl. 684.

(*q*) *Ex parte Simpson*, 1 De Gex, 9; *Gordon v. Dotterill*, 1 M. & K. 56; 21 L. J., Chanc. 843; *Willis v. Plasket*, 4 Beav. 203; *Douglas v. Congreve*, Keen, 410; *Hotham v. Sutton*, 15 Ves. 319.

the term "securities for money," unless the expression be controlled by the context. However, stock in the funds has been said to pass or not, under the word "monies," or the word "goods," or the word "chattels," according to the whole context of the will, and either "goods," or "chattels," used simply, and without qualification, will pass it in a will (*r*); and where the testator did not bank with the Bank of England, a bequest of "all my money in the Bank of England," passed stock in the funds (*s*).

Stock Certificates.—The statute 26 Vict. c. 28, enables the holders of public stocks to convert their stock into certificates to bearer, having coupons attached for the payment of the dividends; and the 26 & 27 Vict. c. 73, is a similar enactment in favour of holders of India stock.

Indian Stock.—The capital stock of the old East India Company is not government stock (*t*), nor is the 5 per cent. stock created under the 22 & 23 Vict. c. 39, and subsequent acts, for the loans contracted in this country for the use of the Indian government (*u*). Both these stocks are charges only on the territorial revenues of India. But trustees may invest trust monies in these stocks without being guilty of a breach of trust, unless expressly prohibited by the terms of their trust (*x*).

By 23 Vict. c. 5, s. 2, transfers of the territorial debt of India, or of the Indian government loans registered in the books of the Indian office in London or in the Bank of England, are exempt from stamp duty.

Indian government notes, or the certificates or stock

(*r*) *Kendall v. Kendall*, 4 Russ. 360.

(*s*) *Gallini v. Noble*, 3 Mer. 691.

(*t*) *Brown v. Brown*, 4 Kay & J. 704.

(*u*) The stock is transferable at the Bank of England, and the dividends payable there by virtue of the 23 & 24 Vict. c. 102, and 24 Vict. c. 3, s. 9, and at the Bank of Ireland by virtue of the 25 Vict. c. 7. By 27 & 28 Vict. c. 50, assignments and transfers of India stock in the Bank of Ireland are valid, although not accepted in writing.

(*x*) 22 & 23 Vict. c. 35, s. 32; *In re Colne Valley Act*, 29 L. J., Chanc. 33; *In re Langford*, 31 L. J., Chanc. 334.

issued in lieu thereof, registered in the books of the bank or of the India office in London for the payment of interest, are to be deemed personal estate of a person dying in England, for the purpose of probate duty (*d*).

Contracts for the Sale of Stock.—A contract for the sale of stock differs from a contract for the sale of a specific chattel, inasmuch as stock does not belong to the head of chattels; and, therefore, a contract for the sale of stock would be satisfied by the delivery of any stock of the description bargained for; consequently, what is usually called a contract for sale in such a case, does not mean an actual sale, but only a contract to deliver, and such contract is not a contract for the sale of “goods, wares or merchandize,” within the 17th section of the Statute of Frauds, so as to require a memorandum in writing (*e*). The contract requires to be stamped in order to be valid (*f*).

Transfer of Stock.—The stock vests, by the transfer, without acceptance (*g*).

Where a statute declared the stock created under it to be transferable as the act directed, and not otherwise, and enacted, that the entries of transfer shall be signed by the parties making such transfers, and that any person to whom such transfer shall be made shall underwrite his acceptance thereof, and that no other method of transferring such stock shall be valid; and a person alleging himself to be a holder of stock brought an action against the Bank of England for not paying dividends, it was held that he could not dispute the title of the transferee, on the ground that such

(*d*) 23 Vict. c. 5, s. 1.

(*e*) *Heseltine v. Siggers*, 1 Exch. 856.

(*f*) *Stamps on Contracts.*]—By 23 & 24 Vict. c. 111, Sched., tit. “Contract Note,” any note, memorandum or writing commonly called a contract note, for or relating to the sale or purchase of any government or other public stocks or funds or securities to the amount or value of 5*l.* or upwards, is subject to a penny stamp duty impressed on, or affixed to, the note.

(*g*) *Rex v. Gade*, 2 Leach, C. C. 732.

transferee had not underwritten his acceptance, the claimant of the dividends having himself executed the transfer, in the prescribed mode (*h*), and pocketed the price of the stock.

The direction as to the acceptance of the stock, required by this statute, appears to have reference only to the rights of the transferee as against the bank (*i*).

If the Bank of England make an unreasonable delay in passing a power of attorney for the transfer of stock, they are liable in damages for any loss sustained in consequence; they are to have time to take all reasonable means for clearing up any doubt as to the authenticity of the power of attorney, which they may reasonably entertain (*k*).

This being the case, it follows,—and it follows *à fortiori*,—that they are responsible in an action if they refuse to transfer, and a *mandamus* does not therefore go to compel them to transfer (*l*).

By Joint Proprietors and by Survivors.—A joint tenant of stock cannot legally transfer *his* share; for virtually, at least in the case of two joint tenants, that would amount to the power of transferring the whole (*m*).

Stock standing in the names of two persons jointly, on the death of one becomes, at law, the absolute property of the survivor, and therefore the administrator of the deceased cannot maintain against the survivor an action to recover the deceased's share, although, if there is a trust in favour of a third person, the survivor may be responsible in a Court of Equity for the disposition of the property according to the trust (*n*).

When stock has been purchased in the joint names of two persons, out of money standing to their joint account in the bank, it is not necessarily to be considered as held

(*h*) *Foster v. Bank of England*, 8 Q. B. 689.

(*i*) 8 Q. B. 706.

(*k*) *Sutton v. Bank of England*, 1 Car. & P. 193; R. & M. 52.

(*l*) *Rex v. Bank of England*, 2 Dougl. 524; Com. Dig. Action on the Case, A. 4.

(*m*) *Sloman v. Bank of England*, 14 Sim. 488.

(*n*) *Crossfield v. Such*, 8 Exch. 825; 22 L. J., Exch. 325.

in joint tenancy, but the origin of the money and the acts and intentions of the parties may be looked to, and a conclusion in favour of a tenancy in common drawn from these circumstances (*o*). Two sisters, being tenants in common of estates, had money arising from the rents standing to their joint account in the bank. Part of the money was from time to time invested in the purchase of stock in their joint names, and part on mortgage, the mortgaged premises being conveyed to them as tenants in common. Each sister, by her will, affected to dispose of her share of the stock: it was held, that they were entitled to the stock as tenants in common and not as joint tenants (*o*). But where two sisters carried on business as farmers, and had a joint account at their bankers, and an establishment and purse in common. They invested part of their money in the purchase of consols, in their joint names, and they had a balance due to them on their banking account, besides a sum due from their bankers on deposit notes: it was held, on the death of one, that the two sisters were joint tenants of the consols, and tenants in common of the balance and of the deposit notes (*p*).

Powers of Attorney.—A power of attorney, to transfer stock, is revocable, by a stockholder acting personally for himself, without deed (*q*). So is a power to receive dividends (*r*). Stock may be legally transferred under a power of attorney after the death of the grantor, if without notice of his death (*s*). So after the revocation of the power, if before notice of the revocation (*t*). Powers of attorney for the transfer of stock, or for the receipt of dividends, are subject to certain stamp duties (*u*).

(*o*) *Robinson v. Preston*, 27 L. J., Chanc. 395; 4 Kay & J. 505.

(*p*) *Bone v. Pollard*, 24 Beav. 283.

(*q*) *Rex v. Wait*, 11 Price, 518; 7 Moore, 473.

(*r*) *Clark v. Laurie*, 26 L. J., Exch. 36.

(*s*) *Kiddill v. Farnell*, 3 Sm. & G. 428; 26 L. J., Chanc. 818.

(*t*) Story on Agency, s. 470, 5th edit.

(*u*) The stamp duties on letters or powers of attorney are regulated by 27 & 28 Vict. c. 18. They are as follows:—

Transfer of Stock under forged Powers of Attorney. A forged power of attorney has no effect to transfer stock standing in the name of A. to the name of B.; consequently, if the bank transfers A.'s stock under a forged power of attorney, the bank will be liable to replace A.'s stock (*x*). A. may recover damages against the bank for not making a transfer from A. to a purchaser (*x*).

If, however, A. had knowledge of the forgery, and refused, or omitted, to apprise the bank of it, such conduct would disable him from recovering (*y*).

If one of two trustees of stock forges the signature of his co-trustee to a power of attorney, and under it sells out stock and absconds, the bank is compellable, in a

For the sale, transfer or acceptance of any of the government or parliamentary stocks or funds :

	£	s.	d.
If the value exceeds 20 <i>l.</i>	1	0	0
And if not 20 <i>l.</i>	0	5	0

By a subsequent act of the same session, 27 & 28 Vict. c. 90, a power of attorney for the sale, transfer or acceptance of these stocks, if duly stamped, shall be not chargeable with any further or other stamp duty by reason of its containing any authority for the receipt of dividends.

For Receipt of Dividends.

For the receipt of dividends or interest of any of the government or parliamentary stocks or funds, or of the stocks, funds or shares of or in any joint stock company or other company or society, whose stocks or funds are divided into shares and transferable :

	£	s.	d.
If for the receipt of one payment only	0	1	0
And for a continuous receipt, or for more than one payment	0	5	0
For the receipt of any sum of money, or any cheque, note or draft for any sum of money not exceeding 20 <i>l.</i> (except in the cases aforesaid), or any periodical payment (other than as aforesaid) not exceeding the annual sum of 10 <i>l.</i>	0	5	0

But considerable doubts having arisen whether the following documents did not amount to powers of attorney and as such chargeable to these duties it was provided by sect. 2 of the 27 & 28 Vict. c. 90, that no letter or other writing under hand only, containing any request or direction to any joint stock company or society, or to any secretary, treasurer or other officer or to any banker, by the owner or proprietor of any stocks, funds or shares of or in any such company or society, to pay dividends or interest arising therefrom to any person named in such order, request or direction shall be chargeable with stamp duty as a letter or power of attorney.

Any letter of attorney for the receipt of dividends of any definite and certain share of the government or parliamentary stocks or funds producing a yearly dividend of less than 3*l.* is exempted.

(*x*) *Coles v. Bank of England*, 10 A. & E. 449; *Hume v. Bolland*, 1 C. & M. 130.

(*y*) *Stracy v. Bank of England*, 6 Bing. 754; *S. P.* 5 H. L. Cas. 389, 411.

Court of Equity, to re-invest the stock in the name of the other trustee (z).

Not only is the Bank of England liable, if it transfers government stock under a forged power of attorney, in cases of individuals, but if the common seal of a corporate body holding stock improperly affixed to a letter of attorney without the knowledge or consent of the corporation, even though affixed by their agent, provided they have not subsequently ratified his act, and, in consequence and upon the production of the forged instrument, the bank makes the transfer, they are liable in an action, at the suit of the corporation, for permitting it to be transferred without the authority of the corporation (a). The agent signed the power of attorney, and his signature was well known at the bank to be that of the agent of the corporation; but the attestations affixed were forgeries. In fact, it is the duty of the bank to prevent the entry of a transfer in their books, until satisfied that the person who claims to be allowed to make it is duly authorized so to do. Were the law otherwise, the whole property of every stockholder would be at the mercy of the bank clerks. If it could be shown that the corporation neglected to take proper measures for the safe and close custody of its common seal, so as to be chargeable with having itself contributed to the loss, then, perhaps, according to the rule, that, of two innocent parties, he shall bear the loss whose conduct has led to the result, the corporation, as between them and the bank, must suffer.

It is felony to forge any power of attorney for the transfer of any stock at the Bank of England or of Ireland (b), or to forge any name, handwriting or signature, purporting to be the name, handwriting or signature of a

(z) *Sloman v. Bank of England*, 14 Sim. 475; *Midland Railway Company v. Taylor*, 8 Jur. N. S. 419, H. L.

(a) *Bank of Ireland v. Evans's Trustees*, 3 Ir. Chanc. Rep. 280; 5 H. L. Cas. 389.

(b) 24 & 25 Vict. c. 98, s. 2.

witness attesting the execution of such power of attorney (c).

Transfer into Fictitious Names.—If a bankrupt, for the purpose of defrauding his creditors, purchases stock, of which he obtains the transfer into a fictitious name, a Court of Equity will afford relief *to the creditors*, by ordering the Bank of England to erase the fictitious name, and insert that of the bankrupt as the transferee (d).

Forging Transfers.—It is felony to forge the transfer of any share or interest of or in any stock transferable at the Bank of England or at the Bank of Ireland (e).

Transfer of Stock on Death of Stockholder.—Formerly, it was obligatory on the Bank of England to register such parts of every will or codicil as bequeathed any estate, property or interest in any public stocks, or in any dividends arising therefrom; but by the 8 & 9 Vict. c. 97, s. 2, the Bank of England is relieved from this burden; and, instead, it is sufficient, if, before permitting the transfer of such stocks, or the receipt of any dividends upon stocks standing in the name of any deceased person, they register the name of the deceased person, and of his executors or administrators respectively, as the case may be. By the same statute, all stocks in the Public Funds standing in the names of any deceased person may be transferred by the executors or administrators, notwithstanding any specific bequest or disposition thereof in the will.

The Bank of England, however, is not bound to permit the transfer of the stock or the receipt of any dividends by the executors or administrators until the probate of the will or the letters of administration have been left at the Bank of England for registration. But, though there is a specific bequest, the bank is bound to permit the executor

(c) 24 & 25 Vict. c. 98, s. 4.

(d) *Green v. Bank of England*, 3 Y. & C. 722; 12 & 13 Vict. c. 106, s. 128.

(e) 24 & 25 Vict. c. 98, s. 2.

to transfer, unless it can be shown that he has assented to the legacy (*f*).

The bank may also insist upon all the executors, who have proved the will, joining and concurring in every transfer of the stocks, or of any part of them (*g*).

Personating Stockholders.—The personating of an owner of stock in the funds, or of the dividends, and thereby endeavouring to transfer the stock or receive the dividends, is felony (*h*).

Bank Books.—Making false entries or altering any words or figures in the books of the Bank of England or of Ireland, in which the accounts of the owners of stock are kept, is felony (*i*).

Inspection of Books.—The books of the Bank of England cannot be inspected by persons who have no interest in them, or who seek an inspection for purposes of a private nature, unconnected with the objects for which the books are kept.

A fund-holder has a right to inspect, and copy entries relating to the stock and its transfers in which he is interested; but he has only the right as to the particular entries relating to the particular parcel of stock, and no other (*k*); and the bank is accordingly liable to furnish a list of such of their books as contain entries of stock in which the party applying is interested, and the Courts of Equity enforce this obligation (*l*).

The bank books are, in general, not removable, on the

(*f*) *Franklin v. Bank of England*, 9 B. & C. 156; *S. C.*, 1 Russ. 575; 4 L. J., Chanc. 214.

(*g*) 8 & 9 Vict. c. 97, s. 1.

(*h*) 24 & 25 Vict. c. 98, s. 3.

(*i*) 24 & 25 Vict. c. 98, s. 5.

(*k*) *Foster v. Bank of England*, 8 Q. B. 689. Stock broker's certificate, when evidence of funds in the books of the Bank of England, *Glynn v. Bell*, 2 Beav. 17.

(*l*) *Heslop v. Bank of England*, 6 Sim. 192.

ground of public inconvenience (*m*), and they are proveable, either by examined or by certified copies (*n*).

The bank books are the best evidence of the transfer of stock, but still it is not always necessary that they should be produced to afford this proof; the signature of the alleged transferee may be proved by a person who knew the party's handwriting, and had inspected the signature of acceptance in the books (*o*).

Trusts.—The Bank of England does not take notice of trusts; they are not to look beyond the legal title; therefore they cannot prevent an executor selling out or transferring stock into his own name (*p*), and are not chargeable, if he transfers the stock to persons not entitled under the will (*q*). There is a case decided in relation to this point a good many years ago, in which the facts were these:—

A transfer was made of stock at the bank in the name of a wife by her husband, which stock, it was suspected, she held by virtue of a trust to her separate use. A memorandum was made by the bank on the transfer, indicating that a flaw was suspected in the title. This, it was held, must not be allowed; it was further held, that no secret trust, as against the party having an open legal title, will affect the bank.

Lord Mansfield added, "I won't say a word against the holder of the stock having his action against the bank, for disparaging his title" (*r*).

The fact is, if the bank looked beyond the legal title, for instance, if they took notice of the trusts of a will, they must be held to take notice throughout, and therefore they would have to stand the consequences of resulting trusts,

(*m*) *Mortimer v. M'Callan*, 6 M. & W. 58, 67, 69; *Rex v. Gordon*, Dougl. 572, n.; *Davis v. Bank of England*, 2 Bing. 404.

(*n*) 14 & 15 Vict. c. 99, s. 14.

(*o*) *Mortimer v. M'Callan*, 6 M. & W. 58.

(*p*) *Bank of England v. Parsons*, 5 Ves. 665.

(*q*) *Hartga v. Bank of England*, 3 Ves. 55.

(*r*) *Lady Mayo's Case*, Lofft, 65.

and such trusts as would be raised by a Court of Equity (*s*); in fact, if so, they would be charged with all the trusts in the kingdom (*t*).

In reality, there is nothing in the statutes relating to the establishment or regulation of the bank, which make them trustees of the public funds for any person; if they voluntarily enter in their books a trustee's account, they may, under certain circumstances, become liable for the performance of the trusts; they stand much in the same relation to stock, that a depositary of goods does to the goods; if they have notice that the person in whose name the stocks stand is not the real owner, or holds subject to a claim, and they, nevertheless, allow the transfer to be made, there they may be, but then only, responsible for the transfer (*u*).

It is common, in order to avoid the frequent recurrence of the necessity of appointing fresh trustees—at least it is not uncommon when the stock is considerable—to appoint, in the first instance, four trustees; for then, on the decease of one, or even of a second, of the trustees, there still remains the check, which one mind may be supposed to have over a tendency to dishonesty in the other.

In general, it is a rule with the Bank of England, not to allow a fund to be transferred into the names of *more* than four joint owners.

Trustees and others, in whose names stocks or annuities stand in the books of the bank, upon trusts, may transfer the same into the name of the accountant-general, to attend the orders of the Court of Chancery, and the bank will be bound to comply with such orders vesting the right to such stock, its transfer and dividends (*x*).

Distringas upon.—A claimant to an interest in stock transferable at the Bank of England, standing in the name or

(*s*) *Bank of England v. Parsons*, 5 Ves. 669.

(*t*) 3 Ves. 58.

(*u*) *Humberstone v. Chase*, 2 Y. & C. 209.

(*x*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74; 15 & 16 Vict. c. 55.

names of any person or persons, or body politic or corporate, in the bank books, who is desirous to restrain the transfer of of such stock, or to restrain the payment of the dividends thereof, issues a *distringas*, prepared by his solicitor, and sealed by the clerk of records and writs, in the form prescribed by the 5 Vict. c. 5, s. 5 (*y*). The writ is then to be served on the Bank of England, together with a notice not to permit the transfer, or not to pay the dividends, as the case may be.

That a person has obtained a *distringas* under sect. 5 of the statute, is not, *per se*, an objection to his also obtaining a restraining order under sect. 4 (*z*).

Such restraining order continues in force until discharged, after a bill has been filed for the same purpose (*a*), or until the Court varies or discharges it (*a*).

A *distringas* made applicable to stock, which was not the particular stock mentioned in the affidavit on which the writ had been obtained, will be set aside with costs (*b*).

As the bank can look only to the legal title to the stock, it follows that they cannot pay the dividends to any one but to the person having the legal title, under any circumstances; the following is an example of this:—

A testator died possessed of a large sum in the funds, a sum of 5,000*l.* of which he bequeathed to A.; this stock stood in the name of the executors. A judgment was obtained against A., and the creditor took out a judge's order, under 1 & 2 Vict. c. 110, ss. 14 and 15, charging so much of the dividends only as was payable to the sole use and benefit of A., with the judgment debt. Accordingly, the bank refused to pay the dividends upon the sum of which the testator died possessed, to the executors; they therefore brought an action against the bank to recover one half-year's dividend, and the bank applied for a stay of

(*y*) Form of Affidavit, Order XXVII., Gen. Orders, H. T. 1860; 29 L. J., Chanc. 26.

(*z*) *In re Marquis of Hertford*, 1 Hare, 584; S. C., 1 Ph. 129.

(*a*) *In re Marquis of Hertford*, 1 Ph. 203.

(*b*) *In re Cross*, 31 L. J., Chanc. 255.

proceedings, on payment of such portion of the dividends as the Court should direct; but the Court considered the application to be unnecessary, because the bank was not affected by the judge's order, which bound the executors, not the bank; their duty, in such case, is to pay the dividends to the executors, the legal owners of the stock, who are answerable in equity for the proper application of the dividends (*c*), upon the production of the judge's order charging the stock or dividends (*d*).

A judgment creditor will be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding the creditor has since his mortgage, but before notice thereof to the trustee of the fund, obtained an order charging the fund (*e*).

The 1 & 2 Vict. c. 110, s. 14, prevents any proceeding being taken, to have the benefit of the charge, until after the expiration of six calendar months from the date of the charging order; but, nevertheless, the Court of Chancery will make a stop order, at the instance of the creditor, to prevent the debtor from receiving dividends of the stock accruing within the six months (*f*).

Where a question of equitable lien on the stock is depending, and the bank, in consequence, refuses to permit a transfer of it, the bank is regarded as a stakeholder, and the Court of Chancery refuses to make an order to compel the bank to permit the transfer (*g*); on the other hand, a Court of Equity, on a proper application, will restrain the bank from transferring stock without notice to the party interested (*h*).

Dividends.—By the 8 & 9 Vict. c. 97, s. 3, the bank is

(*c*) *Fowler v. Churchill*, 11 M. & W. 57, 323; 2 D., N. S. 767; *Bristed v. Wilkins*, 3 Hare, 235; *Smith v. Ward*, 15 Sim. 56.

(*d*) See 2 D., N. S. 565; 2 Exch. 744.

(*e*) *Scott v. Lord Hastings*, 4 Kay & J. 240.

(*f*) *Watts v. Jefferyes*, 3 Mac. & G. 372. It is only a common law judge who can make this order; *Hulkes v. Day*, 10 Sim. 41. As to the form of a judge's order, *Robinson v. Burbidge*, 1 L., M. & P. 94. As to stop orders, see Order XXVI., Gen. Orders, H. T. 1860; 29 L. J., Chanc. 26.

(*g*) *Birch v. Corbyn*, 1 Bro. C. C. 571.

(*h*) *Ex parte Field*, 1 Y. & C. 1; 5 Vict. c. 5, s. 4.

authorized to pay dividends under the power of attorney of one joint owner, where the other is either an infant or of unsound mind.

Action to recover.—In an action, however, against the bank for the nonpayment of dividends, the plaintiff must allege and prove that the money to discharge the dividends has been received by the bank from the government, for the bank has no more than the care of the stock; and it must be shown that they have funds, before they can be proved to have committed a breach of duty in not paying them over to the plaintiff(*k*).

Forging Powers of Attorney to receive.—Forging a power of attorney for the receipt of any dividend is a felony(*l*).

Dividend Warrants.—By an usage of bankers and merchants in London, the Bank of England drafts upon their cashiers for the payment of dividends on government stock—commonly called dividend warrants—with the receipts already subscribed, were passed from hand to hand, like promissory notes of a bank, and paid by the cashiers of the Bank of England to *bonâ fide* holders, after a certain day; the admission of the payee that he has received the money appearing on the document, and making it, as far as the bank is concerned, payable to bearer a few days later than the date of the receipt. But it has been holden, by the Court of Exchequer Chamber, that such instruments, on the face of them, not being negotiable by the general law of the land, and the usage not immemorial, so as to be capable of being considered the custom of the city of London, and therefore binding upon every one in the city, whether he knew of it or not, did not form the only mode by which dividends were payable. Therefore, if A., an owner of government stock, gives a power of attorney to B., authorizing him to receive and give receipts for the

(*k*) *Bank of England v. Davis*, 5 B. & C. 185.

(*l*) 24 & 25 Vict. c. 98, s. 4.

dividends thereon, and B. gets from the bank a dividend warrant accordingly, which he passes for good consideration to C., who requires payment of the dividends by the bank to him, the Bank of England, it seems, is not compellable at law to pay C. the dividends, and could not, on that ground, resist the payment of them to A., the real owner, it not appearing to the Court that the transaction between B. and C. was *bonâ fide*, as regarded C. (*m*), and the Court doubted whether a *bonâ fide* holder could compel payment (*n*).

Making out False Dividend Warrants.—It is felony for any clerk, officer or servant of the Bank of England, or of Ireland, to make out or deliver any dividend warrant for a greater or less amount than the person on whose behalf the warrant is made out is entitled to, with intent to defraud (*o*).

Unclaimed Dividends.—By the 56 Geo. III. c. 60, all stock in the public funds, upon which dividends have remained unclaimed for ten years, is authorized to be transferred to the account of the Commissioners for the Reduction of the National Debt, in the books of the Bank of England; the statute also authorizes the Bank of England to retransfer such stock to any person who shall show, to the satisfaction of the governor of the Bank of England, his right or title thereto; but if the governor shall not be satisfied of the legality of such claim, the Court of Chancery may, upon petition of such claimant, make order for its retransfer.

Under this statute it is not necessary for the claimant to show himself to be beneficially interested in the stock; to prove a legal claim to it is sufficient (*p*). But then it is not a matter of course, where there is anything to indicate

(*m*) *Partridge v. Bank of England*, 9 Q. B. 396.

(*n*) See 9 Q. B. 426.

(*o*) 24 & 25 Vict. c. 98, s. 6.

(*p*) *In re Bigg*, 1 Y. & C. 245.

the parties not to be beneficially entitled, to order a re-transfer upon the claimants making out a legal title, such as a transfer would have been made to him upon, if the ten years had not elapsed; thus, if stock stands in the names of two persons, one of whom survives the other upwards of ten years, but has not, during that time, claimed any dividends, the Court refuses, upon petition of the survivor's widow and personal representative, to order the stock to be retransferred into her name, or into the names of the two deceased persons, but directs a reference to inquire who is entitled to the stock, with liberty to state special circumstances (*q*).

It is the legal owner of the stock—the person, or his representatives, in whom is the legal title—who is entitled to the retransfer; the *cestui que trust* has no right to it (*r*).

By the 8 & 9 Vict. c. 62, when the dividends on stock have remained unclaimed for ten years, they are to be paid to the Commissioners for the Reduction of the National Debt. Before any retransfer of unclaimed stock or payment of dividends can be made, notice of the claim of the party is to be advertised in the newspapers. The 23 & 24 Vict. c. 71, extends the above provisions to Irish Stock and dividends.

Bank Stock.—Before the 22 & 23 Vict. c. 35, s. 32, an investment by trustees of trust monies in Bank of England stock, though it was practically as safe as the government funds, was not regarded by the Courts of Equity as a proper investment of trust monies, and, upon knowledge of the fact that such an investment had been made, they would have ordered the stock to be sold out, and the proceeds invested in Consols. If any loss was occasioned to the trust estate by fluctuation in the prices of the bank stock, or of the government stock, between the dates when the investment was made, and the re-investing in

(*q*) *Ex parte Ram*, 3 M. & C. 25; *In re Bishton*, 27 L. J., Chanc. 168.

(*r*) 3 Mad. 33.

Consols, the trustee had to make good the difference (*s*). But now a trustee, or an executor, or an administrator, unless he is expressly forbidden by the instrument creating his trust, may invest any trust fund in the stock of the Bank of England or of Ireland, and the trustee so doing will not be liable on that account as for a breach of trust, if the investment is in other respects reasonable and proper (*t*). Upon a loss sustained by a depreciation in the price of consols, a trustee upon a proper investment will not be liable for the difference (*u*).

Bonuses.—An extraordinary division of a sum of money among the proprietors of bank stock, beyond the ordinary dividend, by way of bonus, is considered as an accretion to the capital; therefore, a tenant for life of the bank stock, in respect of which the division is made, is not entitled to the bonus, but only to the dividends upon *it* considered as capital, as they accrued during his life (*x*); it makes no difference that the division was in money, and not in stock; that did not cause it to be considered as a profit arising and payable in the time of the tenant for life, and to which, therefore, he was entitled, inasmuch as all the profits, ordinary and extraordinary, arose in the same way (*x*).

Stock stood in the names of trustees under a marriage settlement, to pay the dividends with any bonuses that might from time to time be allowed, and when the same should be payable, to a husband and his wife and the survivor for life: it was held, that the husband was absolutely entitled to a bonus declared during his life estate (*y*). He did not take the bonus, but allowed it to be added to the capital and received the dividends on the whole. On his death, the wife as survivor was entitled to receive the bonus (*y*).

(*s*) *Hancon v. Allen*, 2 Dick. 498; *Clough v. Bond*, 3 M. & C. 496.

(*t*) 22 & 23 Vict. c. 35, s. 32, and 23 & 24 Vict. c. 38, s. 12.

(*u*) *Peat v. Crane*, 2 Dick. 499, n.

(*x*) *Brander v. Brander*, 4 Ves. 802; *Irvine v. Houston*, 10 Ves. 189; 14 Ves. 70, 78; 13 Price, 774; *Paris v. Paris*, 10 Ves. 185; *Clayton v. Gresham*, 10 Ves. 290; *Witt v. Steere*, 13 Ves. 363.

(*y*) *In re Mittam*, 4 Jur. N. S. 1077.

Bequests.—When a person is possessed of money in consols and other government securities, and also of bank stock, and bequeaths “all his fortune standing in the funds,” the bank stock does not pass. The reason is, that the words “the funds” have received an interpretation to mean “the public funds,” as appears from the Stamp Acts, which have always made a distinction between bank stock and the government funds (z).

On the other hand, when a person not having either at the date of his will or at the time of his death any bank stock, but having some Three and a quarter per Cent. Annuities, there being no other stock standing in his name, bequeaths “all my bank stock,” the annuities will pass (a).

Stamps on Notes.—The promissory notes and bank post bills of the bank are exempt from stamp duty (b).

(z) *Grainger v. Slingsby*, 25 L. J., Chanc. 573; 8 De G., Mac. & G. 385; S. C., 7 H. L. Cas. 273.

(a) *Drake v. Martin*, 26 L. J., Chanc. 786.

(b) 55 Geo. III. c. 184, s. 20; 7 & 8 Vict. c. 32, s. 7.

CHAPTER XIX.

BANK OF IRELAND AND BANK OF SCOTLAND.

Bank of Ireland.—The Bank of Ireland was established by an act of the Irish parliament (*a*), and possesses similar privileges to the Bank of England, and is governed by similar principles. The restriction in that act against the bank lending or advancing money on the mortgage or on sale of lands, tenements, or hereditaments, redeemable, has been recently repealed (*b*).

The 8 & 9 Vict. c. 37, continues the bank's privileges until determined by notice in the Dublin Gazette, and regulates the issue of bank notes or bills payable on demand. The notes, bank post bills, and bank bills of exchange of the bank, may be signed by machinery after the 29th of July, 1864 (*c*).

Bank of Scotland.—The Bank of Scotland was established by an act of Parliament in 1695. The commissioners of the treasury may compound with the Bank of Scotland, the Royal Bank of Scotland, the British Linen Company, and other Scotch banks, for the stamp duty payable on their notes and bills of exchange (*d*). The 8 & 9 Vict. c. 38, regulates the issue of bank notes in Scotland; and by 7 Geo. IV. c. 67, banking co-partnerships, established in Scotland, may sue and be sued in the name of their manager, cashier or other chief officer.

(*a*) 21 & 22 Geo. III. c. 16 (Irish).

(*b*) 23 & 24 Vict. c. 31.

(*c*) 27 & 28 Vict. c. 78.

(*d*) 16 & 17 Vict. c. 63, s. 7.

CHAPTER XX.

BANKS OF ISSUE.

Bank of England.—The Bank of England is a bank of issue, and its powers, in this respect, are defined by the 7 & 8 Vict. c. 32, commonly called the Bank Charter Act of 1844. By that act the banking and issue departments were separated, and the bank was authorized to issue from the issue department, into the banking department, notes payable on demand, to the amount of 14,000,000*l.*, upon the credit of securities of equivalent value, first being lodged in the issue department. The amount of these securities or the notes may be diminished from time to time, but cannot be increased (*a*) or exceeded (*b*), “save in exchange for other Bank of England notes, or for gold coin, or for gold (*c*) or silver bullion (*d*), purchased or

(*a*) Sect. 5, however, provides for a limited increase of securities and notes. If a country banker shall cease to issue his own notes, an order in council may empower the bank to increase the securities, and issue additional notes, but such increase is not to exceed two-thirds of the authorized issue of such banker. In the preamble of the 21 Vict. c. 1, indemnifying the bank, on the occasion of an over-issue, in 1857, the amount of the securities acquired and taken in the issue department is then stated to be limited to 14,750,000*l.* under the provisions of the act and an order in council. The bank, by sect. 9 of the 7 & 8 Vict. c. 32, is to allow the public the profits of its increased circulation, which profits, by the 24 Vict. c. 3, s. 4, are payable between the 6th of April and the 5th of July yearly, to the account of the comptroller of the Exchequer.

(*b*) In 1857, the bank having issued notes in excess of its authorized circulation, by direction of the government, in order to meet an extraordinary demand for discount and to avoid pressure on the reserves of the bank, the 21 Vict. c. 1, was passed to indemnify the bank, and confirm the issue.

(*c*) By sect. 4, Bank of England notes may be demanded at the issue department in exchange for gold bullion at the rate of £3:17*s.* 9*d.* per ounce of standard gold, but it must be melted and assayed at the expense of the parties.

(*d*) Sect. 3, limits the amount of silver bullion to be retained at a time by the bank in the issue department to one-fourth of the gold coin and the bullion in that department.

received for the issue department or in exchange for securities acquired and taken in that department.”

An account of the notes in circulation and of the securities in the issue department, as well of the capital stock, deposits, money and securities in the banking department, is to be transmitted weekly to the commissioners of stamps and taxes (*e*), and published in the Gazette.

The notes of the bank payable to bearer on demand are exempt from stamp duty (*f*), and may be signed by machinery (*g*).

Other Banks of Issue.—The regulations under which bankers are entitled to issue their promissory notes and bills of exchange, on unstamped paper, are contained in the 9 Geo. IV. c. 23, and 7 & 8 Vict. c. 32, already referred to.

By 9 Geo. IV. c. 23, s. 1, after the 1st of July, 1828, it shall be lawful for any person or persons carrying on the business of a banker or bankers in England (except within the city of London or within three miles thereof), having first duly obtained a licence for that purpose, and given security by bond, to issue, on unstamped paper, promissory notes for any sum of money amounting to five pounds or upwards, expressed to be payable to the bearer on demand, or to order, at any period not exceeding seven days after sight; and also to draw and issue, on unstamped paper, bills of exchange, expressed to be payable to order, on demand, or at any period not exceeding seven days after sight, or twenty-one days after the date thereof: *provided* such bills of exchange be drawn upon a person or persons carrying on the business of a banker or bankers in London, Westminster or the borough of Southwark; or *provided* such bills of exchange be drawn by any banker or bankers at a town or place where he or they shall be duly licensed to

(*e*) By the 12 & 13 Vict. c. 1, the commissioners are now called the commissioners of inland revenue.

(*f*) Sect. 7. By sect. 8, the bank, in consideration of the exemption and the privileges of exclusive banking conferred by the act, paid or allowed to the public 180,000*l.* per annum, out of the charges due to the bank for its management of the national debt. By 24 Vict. c. 3, s. 4, the sum of 60,000*l.* is now payable by the bank in consideration of the exemption between the 6th of April and the 5th of July yearly, to the commissioners of inland revenue.

(*g*) 1 Geo. IV. c. 92, s. 3, and 16 & 17 Vict. c. 2, s. 1.

issue unstamped notes and bills, under the authority of this act, upon himself or themselves, or his or their copartner or copartners, payable at any other town or place where such banker or bankers shall also be duly licensed to issue such notes and bills as aforesaid.

The 7 & 8 Vict. c. 32, limits the power of issuing by the following enactments (*h*), viz.:—

By sect. 10, after the 19th of July, 1844, no person, other than a banker, who, on the 6th of May, 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom.

And by sect. 11, after the 19th of July, 1844, it shall not be lawful for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money, payable to bearer on demand, or to borrow, owe or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker, who was on the 6th of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes under the authority of a licence to that effect, to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership, now consisting of

(*h*) A company, consisting of a large number of persons subscribing small sums of money, was formed in 1845, for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. In connexion with the company there was established a bank for receiving deposits of small capitalists and working men, upon the security of the property of the company, and, as part of the concern, a bank in which the subscribers might place their savings for purchasing their land from the company; it was held that the scheme was illegal, as being contrary to the provisions of the above act. *O'Connor v. Bradshaw*, 5 Exch. 882; 20 L. J., Exch. 26. Since the 19th of July, 1844, however, by the 7 & 8 Vict. c. 32, s. 26, any society or company or any persons in partnership, though exceeding six in number, carrying on business in London, or within sixty-five miles thereof, may draw, accept or indorse bills of exchange, *not being payable to bearer on demand*. The 3 & 4 Will. IV. c. 98, s. 3, is therefore repealed in respect of this restriction.

only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

On the death of any of the members of a firm, the privilege of issuing notes continues to the surviving members (*i*).

A banker, who becomes bankrupt, or ceases to carry on his business, or discontinues to issue his own notes, is prohibited by sect. 12 from recommencing or resuming the issue, as follows:—

If any banker in any part of the United Kingdom, who, after the 19th of July, 1844, shall be entitled to issue bank notes, shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

Returns of Circulation.—Existing banks of issue are allowed by sect. 13 to continue as banks of issue, under the restrictions as to returns and other matters, as follows:—

Every banker claiming under this act to continue to issue bank notes in England or Wales, shall, within one month after the 19th of July, 1844, give notice in writing to the commissioners of stamps and taxes, at their head office in London, of such claim, and of the place and name and firm, at and under which such banker has issued such notes during the twelve weeks preceding the 27th of April, 1844; and thereupon the commissioners shall ascertain if such banker was, on the 6th of May, 1844, carrying on the business of a banker, and lawfully issuing his own bank notes in England or Wales, and if it shall so appear, then the commissioners shall proceed to ascertain the average amount of the bank notes of such banker, which were in circulation during the period of twelve weeks preceding the 27th of April, 1844, according to the returns made by such banker in pursuance of the 4 & 5 Vict. c. 50; and the commissioners, or any two of them, shall certify, under their hands to such banker, the average amount, when so ascertained as aforesaid; and it shall be lawful for every such banker to continue to issue his own bank notes after the 19th of July, 1844: provided nevertheless, that such banker shall not at any time after the 10th of October, 1844, have in circulation, upon the average

(*i*) *Smith v. Everett*, 27 Beav. 446; 29 L. J., Chanc. 236.

of a period of four weeks, to be ascertained as hereinafter mentioned, a greater amount of notes than the amount so certified (*k*).

Weekly Returns.—The regulations of the returns of bank notes in circulation, other than those of the Bank of England, prescribed by the 4 & 5 Vict. c. 50, s. 1, under a penalty of 50*l.*, are as follows:—

After the 1st of July, 1841, all corporations and copartnerships carrying on banking business under the provisions of the 7 Geo. IV. c. 46, and all other persons carrying on banking business in England and Wales, and making and issuing promissory notes, payable to bearer on demand, and all corporations, copartnerships and persons carrying on such business and making and issuing such promissory notes as aforesaid in Scotland, and also the Bank of Ireland, and all corporations, copartnerships and persons carrying on such business, and making and issuing such promissory notes as aforesaid in Ireland, shall severally keep just and true accounts of the amount of notes in circulation at the close of the business in each week, and shall, at the end of every four weeks, make up from such weekly accounts a just and true account of the average amount of such notes in circulation during such four weeks; and shall also, within seven days after the conclusion of such four weeks, return and deliver such last-mentioned account for the four weeks immediately preceding, and so on every successive four weeks, such accounts being always verified in the manner hereinafter directed, to the commissioners of stamps and taxes, at their head office in Westminster, upon pain that any corporation, company, copartnership, or persons or person, who shall neglect or omit to keep, or to return and deliver, any such account in the manner directed by this act, shall, for every such neglect or omission, forfeit the sum of fifty pounds, to be recovered, with full costs of suit, in the name of her majesty's attorney or solicitor-general in England or Ireland, or of her majesty's advocate-general in Scotland.

By sect. 2, every such account so to be returned and delivered to the commissioners of stamps and taxes as aforesaid shall be verified by the affidavit or affirmation of the secretary, accountant, cashier or other chief clerk or officer of the corporation, company or copartnership, or persons or person, so carrying on banking business and making such return; and such affidavit or affirmation shall be made before any justice of the peace in any part of the United Kingdom, or before a master extraordinary in Chancery, or any person authorized to take affidavits by any of the Superior Courts in England or Ire-

(*k*) See s. 15, as to evidence of amount of notes in circulation.

land ; and no such affidavit or affirmation shall be liable to any stamp duty.

And by sect. 3, from the accounts which shall be rendered by the Bank of England, in pursuance of the act in that behalf, and also from the accounts which shall be rendered in pursuance of this act, there shall be made up an account of the average aggregate amount of promissory notes payable to bearer on demand, which have been in circulation in the United Kingdom during the preceding four weeks, and so on every successive four weeks, distinguishing those circulated by the Bank of England, by private banks, and by joint stock banks in England and Wales, by the banks in Scotland, by the Bank of Ireland, and by all other banks in Ireland, and of the average amount of the bullion in the Bank of England, during the preceding four weeks ; and such account shall be published in the London Gazette, in every four weeks, as soon as the same can conveniently be prepared for that purpose.

Monthly Averages.—Any excess, above the limited monthly average circulation, is prohibited by 7 & 8 Vict. c. 32, s. 17, as follows :—

If the monthly average circulation of bank notes of any banker, taken in the manner hereinafter directed (1), shall at any time exceed the amount which such banker is authorized to issue and to have in circulation under the provisions of this act, such banker shall in every such case forfeit a sum equal to the amount by which the average monthly circulation, taken as aforesaid, shall have exceeded the amount which such banker was authorized to issue and to have in circulation as aforesaid.

A provision, for the render of accounts, is made by sect. 18, as follows :—

Every banker in England and Wales, who, after the 10th of October, 1844, shall issue bank notes, shall, on some one day in every week after the 19th of October, 1844 (such day to be fixed by the commissioners of stamps and taxes), transmit to the commissioners an account of the amount of the bank notes of such banker in circulation on every day during the week ending on the next preceding Saturday, and also an account of the average amount of the bank notes of such banker in circulation during the same week ; and on completing the first period of four weeks, and so on completing each successive period of four weeks, every such banker shall annex to such account the

(1) See *infra*, p. 393.

average amount of bank notes of such banker in circulation during the said four weeks, and also the amount of such bank notes which such banker is authorized to issue under the provisions of this act; and every such account shall be verified by the signature of such banker, or his chief cashier, or, in the case of a company or partnership, by the signature of a managing director, or partner, or chief cashier, of such company or partnership, and shall be made in the form annexed, marked (B.) (m); and so much of the return as states the weekly average amount of the notes of such bank, shall be published by the commissioners in the next succeeding "London Gazette" in which the same may be conveniently inserted; and if any such banker shall neglect or refuse to render any such account in the form and at the time required by this act, or shall at any time render a false account, such banker shall forfeit 100*l.* for every such offence.

The monthly average is to be ascertained by sect. 19, thus:—

For the purpose of ascertaining the monthly average amount of bank notes of each banker in circulation, the aggregate of the amount of bank notes of each such banker in circulation on every day of business during the first complete period of four weeks after the 10th of

(m) The form is as follows:—

"Name and title as set forth in the licence _____ *Bank.*
 Name of the firm _____ *Firm.*
 Insert head office, or principal place of issue _____ *Place.*

An account pursuant to the act 7 & 8 Vict. c. 32, of the notes of the said bank in circulation during the week ending Saturday the
 day of 18 .

Monday	..	..	..	..	..
Tuesday		..	..	..	..
Wednesday	..	..	..	..	..
Thursday		..	..	..	..
Friday	..	..	..	..	..
Saturday		..	..	..	..

6)

Average of the week ..

[To be annexed to this Account at the end of each Period of Four Weeks].

Amount of notes authorized by law	..	£
Average amount in circulation during the	}	£
four weeks ending as above		

I, being [the banker, chief cashier, managing director, or partner of the _____ bank, as the case may be], do hereby certify, That the above is a true account of the notes of the said bank in circulation during the week above written.

Dated the _____ day of 18 . (Signed)

October, 1844, such period ending on a Saturday, shall be divided by the number of days of business in such four weeks ; and the average so ascertained shall be deemed to be the average of bank notes of each such banker in circulation during such period of four weeks, and so in each successive period of four weeks ; and such average is not to exceed the amount certified by the commissioners of stamps and taxes.

Then the commissioners (by sect. 20) are empowered, (but only with the consent of the Lords of the Treasury,) to examine, copy or make extracts from the books of all banks of issue, containing accounts of the notes in circulation, to ensure the rendering true accounts.

Return of Names to the Stamp Office.—Then follows in the next section an enactment, prescribing annual returns of the names of the partners, &c. ; thus :—

Every banker in England and Wales, who is now carrying on, or shall hereafter carry on business as such, shall, on the 1st of January in each year, or within fifteen days thereafter, make a return to the commissioners of stamps and taxes, at their head office in London, of his name, residence and occupation, or, in the case of a company or partnership, of the name, residence and occupation of every person composing or being a member of such company or partnership, and also the name of the firm under which such banker, company or partnership carry on the business of banking, and of every place where such business is carried on.

Penalty.—And if any such banker, company or partnership shall omit or refuse to make such return within fifteen days after the said 1st of January, or shall wilfully make other than a true return of the persons as herein required, every banker, company or partnership so offending shall forfeit and pay the sum of fifty pounds ; and the commissioners of stamps and taxes shall, on or before the 1st of March in every year, publish in some newspaper circulating within each town or county respectively, a copy of the return so made by every banker, company or partnership carrying on the business of bankers within such town or county respectively, as the case may be.

The 8 & 9 Vict. c. 76, s. 5, prescribes the mode of recovering and applying the penalties.

Quarterly Returns.—Besides the above regulations, however, the obligation to render quarterly returns, had been

already, by the 3 & 4 Will. IV. c. 83, s. 1, imposed upon bankers issuing their own notes; enacting thus:—

That all corporations and copartnerships carrying on banking business under 7 Geo. IV. c. 46, and all other persons carrying on banking business, and making and issuing promissory notes payable to bearer on demand, shall respectively keep weekly accounts from the 28th of August, 1833, of the average amount of notes in circulation at the end of each week of the corporation, copartnership, or persons or person so carrying on banking business and keeping such weekly account; and shall, within one month after the 31st of December, after the 28th of August, 1833, make up from such weekly account an average account of the amount of such notes in circulation during the period between the 28th of August, 1833, and the making up such account; and shall also make up a like account at the end of each quarter, ending on the 1st of April, the 1st of July, the 1st of October, and the 1st of January, in 1834, and every subsequent year, of the average amount of notes in circulation in the preceding quarter, and shall return and deliver such account to the commissioners of stamps, at the Stamp Office in London; and such accounts and returns shall be verified upon the oath of the secretary or accountant, or some officer of the corporation, company or copartnership, or persons or person so carrying on banking business, and making such return, which oath shall be taken before any justice of the peace, and which oath any justice of the peace is authorized to administer.

Penalty.—And if any corporation, company or copartnership, or persons or person so carrying on banking business, shall neglect to keep such weekly accounts, or to make out or to return or deliver such averages to the commissioners of stamps, at the Stamp Office in London, or if any secretary, accountant, or other person verifying any such account or average, shall return or deliver to the commissioners of stamps any false account or return of such averages, the corporation, company or copartnership, or persons or person to whom any such accounts or averages, or such secretary, accountant or person verifying the account, shall belong, shall forfeit for every such offence 500*l.*, and the secretary or other person so offending shall also forfeit for every such offence 100*l.*; and any secretary, accountant or other person who shall knowingly and wilfully take any false oath as to any such accounts or averages, shall be subject to such pains and penalties as are by any law in force at the time of taking such oath enacted as to persons convicted of wilful and corrupt perjury.

Uniting of Banks of Issue.—A provision is made by the 7 & 8 Vict. c. 32, s. 16, for the purpose of facilitating the

union or amalgamation of banking establishments, as far as regards the circulation of their notes, thus:—

In case it shall be made to appear to the commissioners of stamps and taxes, at any time hereafter, that any two or more banks, each such bank consisting of not more than six persons, have, by written contract or agreement (which contract or agreement shall be produced to the commissioners), become united subsequently to the 19th of July, 1844, it shall be lawful to the commissioners, upon the application of such united bank, to certify in manner hereinbefore mentioned, the aggregate of the amounts of bank notes which such separate banks were previously authorized to issue, and so from time to time; and every such certificate shall be published in manner hereinbefore directed; and from and after such publication, the amount therein stated shall be and be deemed to be the limit of the amount of bank notes which such united bank may have in circulation: provided always, that it shall not be lawful for any such united bank to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

By Copartnerships under 7 Geo. IV. c. 46.—Banking copartnerships established under this statute are entitled to issue and re-issue notes, without being stamped, upon security being given by sect. 16, but the enactment must be read in conjunction with the provisions of the 7 & 8 Vict. c. 32, as to becoming bankrupt, and rendering accounts of their issue and circulation. Sect. 16 provides:—

That if any corporation or copartnership carrying on the trade or business of bankers under the authority of this act shall be desirous of issuing and re-issuing notes in the nature of bank notes, payable to the bearer on demand, without the same being stamped as by law is required, it shall be lawful for them so to do on giving security by bond to his majesty, his heirs and successors, in which bond two of the directors, members or partners of such corporation or copartnership shall be the obligors, together with the cashier or cashiers, or accountant or accountants, employed by such corporation or copartnerships, as the commissioners of stamps shall require; and such bonds shall be taken in such reasonable sums as the duties may amount unto during the period of one year, with condition to deliver to the commissioners of stamps, within fourteen days after the 5th of January, the 5th of April, the 5th of July and the 10th of October in every year, whilst the present stamp duties shall remain in force, a just and true account, verified upon the oaths or affirmations of two directors,

members or partners of such corporation or copartnership, and of the cashier or cashiers, accountant or accountants, or such of them as the commissioners of stamps shall require, such oaths or affirmations to be taken before any justice of the peace, and which oaths and affirmations any justice of the peace is authorized and empowered to administer, of the amount or value of all their promissory notes in circulation on some given day in every week, for the space of one quarter of a year prior to the quarter day immediately preceding the delivery of such account, together with the average amount or value thereof, according to such account, and also to pay or cause to be paid into the hands of the receivers-general of stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for such promissory notes issued within the space of one year, the sum of seven shillings for every one hundred pounds, and also for the fractional part of one hundred pounds, of the said average amount or value of such notes in circulation, according to the true intent and meaning of this act; and on due performance thereof such bond shall be void; and it shall be lawful for the commissioners to fix the time or times of making such payment, and to specify the same in the condition to every such bond, and every such bond may be required to be renewed from time to time at the discretion of the commissioners or the major part of them, and as often as the same shall be forfeited, or the party or parties to the same or any of them shall die, become bankrupt or insolvent, or reside in parts beyond the seas.

On issuing bills or notes before making the returns, they forfeited 500*l.* for each week of their neglect, by sect. 18.

Irish and Scotch Banks.—The issue of bank notes in Ireland (*n*) and in Scotland (*o*) is governed by similar provisions and restrictions as the English banks are by the Bank Charter Act of 1844.

Bankers' Licences.—The licensing of bankers to act as such is regulated by the following statutes:—By the 55 Geo. III. c. 184, s. 14, notes payable to bearer on demand, above 5*l.* and not exceeding 100*l.* each, may be re-issued by the original makers without any additional duty; and by sect. 24, bankers may issue and re-issue these notes on

(*n*) 8 & 9 Vict. c. 37. (*o*) Ibid. c. 38.

paying a licence duty of 30*l.* yearly. For this purpose a separate and distinct licence is to be taken out for or in respect of every town or place where these notes shall be issued, or by any agents of the bankers, and shall specify the names and places of their abode, and the proper name and description of any body corporate to whom the same shall be granted, and also the name of the town or place where, and the name of the bank or firm under which, such notes are issued. The licence, when granted to persons in partnership, required the names and places of abode of all the persons concerned in the partnership to be set forth therein. But this is no longer necessary.

By 5 & 6 Vict. c. 82, s. 31, bankers in Ireland re-issuing their own notes must take out a certificate, which is chargeable with an annual duty of 30*l.*

The 9 Geo. IV. c. 23, enabled bankers in England, except within the city of London or within three miles, as already stated (*p*), to issue their promissory notes and to draw bills of exchange not exceeding seven days after sight, or twenty-one days after date, on the condition of obtaining a licence. Thus, by sect. 2:—

It shall be lawful for any two or more of the commissioners of stamps to grant to all persons carrying on the business of bankers in England (except as aforesaid), who shall require the same, licences authorizing such persons to issue such promissory notes, and to draw and issue such bills of exchange as aforesaid, on unstamped paper; which licences shall be and are hereby respectively charged with a stamp duty of thirty pounds for every such licence.

By sect. 2, a separate licence shall be taken out in respect of every town or place where any such unstamped promissory notes or bills of exchange as aforesaid shall be issued or drawn: provided always, that no person or persons shall be obliged to take out more than four licences in all for any number of towns or places in England; and in case any person or persons shall issue or draw such unstamped notes or bills as aforesaid, at more than four different towns or places, then, after taking out three distinct licences for three of such towns or places, such person or persons shall be entitled to have all the rest of such towns or places included in a fourth licence.

By 7 & 8 Vict. c. 32, s. 22, every banker who shall be liable by law to take out a licence from the commissioners of stamps and taxes, to

(*p*) See ante, 388.

authorize the issuing of notes or bills, shall take out a separate and distinct licence for every town or place at which he shall, by himself or his agent, issue any notes or bills requiring such licence to authorize the issuing thereof, anything in any former act contained to the contrary thereof notwithstanding: provided always, that no banker, who, on or before the 6th of May, 1844, had taken out four such licences, which on the said last-mentioned day were respectively in force, for the issuing of any such notes or bills, at more than four separate towns or places, shall at any time hereafter be required to take out or to have in force at one and the same time more than four such licences, to authorize the issuing of such notes or bills at all or any of the same towns or places specified in such licences in force on the 6th of May, 1844, and at which towns or places respectively such bankers had on or before the said last-mentioned day issued such notes or bills in pursuance of such licences or any of them respectively.

By 9 Geo. IV. c. 23, s. 4, every licence granted under the authority of that act shall specify all the particulars required by law to be specified in licences to be taken out by persons issuing promissory notes, payable to bearer on demand, and allowed to be re-issued; and every such licence which shall be granted between the 10th of October and the 11th of November in any year shall be dated on the 11th of October, and every such licence which shall be granted at any other time shall be dated on the day on which the same shall be granted; and every such licence shall (notwithstanding any alteration which may take place in any copartnership of persons to whom the same shall be granted) have effect and continue in force from the day of the date thereof, until the 10th of October then next following, both inclusive, and no longer.

Companies' Licences.—The 24 & 25 Vict. c. 91, s. 35, enacts, that, where a company or copartnership consists of more than six persons, it shall be sufficient to specify in the licence or certificate the names and places of abode of any six or more of such persons who may be presented to the commissioners, and to grant the licence or certificate to them as and for the whole of the company or copartnership, or otherwise to specify only the name or style of the company or copartnership, and to grant the licence or certificate to such company, in and by the said name or style, as the commissioners may think fit; and such licence and certificate are to be as good and available as if the names

and places of abode of all the members of the company had been specified therein, and the licence had been granted to them.

Stamped Bank Notes.—Bankers are prohibited, by 9 Geo. IV. c. 23, s. 6, from issuing their promissory notes on stamped paper, thus:—

If any banker or bankers, who shall take out a licence under the authority of this act, shall issue, under the authority either of this or any other act, any unstamped promissory notes for payment of money to the bearer on demand, such banker or bankers shall, so long as he or they shall continue licensed as aforesaid, make and issue on unstamped paper all his or their promissory notes for payment of money to the bearer on demand, of whatever amount such notes may be; and it shall not be lawful for such banker or bankers, during the period aforesaid, to issue, *for the first time*, any such promissory notes as aforesaid on stamped paper.

Security on Issue of Unstamped Bank Notes.—Bankers licensed to issue their unstamped paper are required, by 9 Geo. IV. c. 23, s. 7, to give security, thus:—

Before any licence shall be granted to any person or persons to issue or draw any unstamped promissory notes or bills of exchange, under the authority of this act, such person or persons shall give security, by bond, to his majesty, his heirs and successors, with a condition, that if such person or persons do and shall from time to time enter, or cause to be entered in a book or books to be kept for that purpose, an account of all such unstamped promissory notes and bills of exchange as he or they shall so as aforesaid issue or draw, specifying the amount or value thereof respectively, and the several dates of the issuing thereof: and in like manner also, a similar account of all such promissory notes as, having been issued as aforesaid, shall have since been cancelled, and the dates of the cancelling thereof, and of all such bills of exchange as, having been drawn or issued as aforesaid, shall have been paid, and the dates of the payment thereof; and do and shall from time to time, when thereunto requested, produce and show such accounts to, and permit the same to be examined and inspected by, the commissioners of stamps, or any officer of stamps appointed under the hands and seals of the commissioners for that purpose; and also do and shall deliver to the commissioners of stamps half-yearly (that is to say), within fourteen days after the 1st of January and the 1st of July in every year, a

just and true account in writing, verified upon the oaths or affirmations (which any justice of the peace is empowered to administer), to the best of the knowledge and belief of such person or persons, and of his or their cashier, accountant or chief clerk, or of such of them as the commissioners shall require, of the amount or value of all unstamped promissory notes and bills of exchange, issued under the provisions of this or any former act, in circulation within the meaning of this act on a given day (that is to say), on Saturday in every week, for the space of half a year prior to the half-yearly day immediately preceding the delivery of such account, together with the average amount or value of such notes and bills so in circulation, according to such account; and also do and shall pay or cause to be paid to the receiver-general of stamp duties in Great Britain, or to some other person duly authorized by the commissioners of stamps to receive the same, as a composition for the duties which would otherwise have been payable for such promissory notes and bills of exchange issued or in circulation during such half-year, the sum of three shillings and sixpence for every one hundred pounds, and also for the fractional part of one hundred pounds, of the said average amount or value of such notes and bills in circulation, according to the true intent and meaning of this act; and on due performance thereof such bond shall be void, but otherwise the same shall be and remain in full force and virtue.

By sect. 8, every unstamped promissory note payable to the bearer on demand, issued under the provisions of this act, shall, for the purpose of payment of duty, be deemed to be in circulation from the day of the issuing to the day of the cancelling thereof, both days inclusive, excepting nevertheless the period during which such note shall be in the hands of the banker or bankers who first issued the same, or by whom the same shall be expressed to be payable; and that every unstamped promissory note payable to order, and every unstamped bill of exchange so as aforesaid issued, shall for the purpose aforesaid be deemed to be in circulation from the day of the issuing to the day of the payment thereof, both days inclusive: provided always, that every such promissory note payable to order, and bill of exchange as aforesaid, which shall be paid in less than seven days from the issuing thereof, shall, for the purpose aforesaid, be included in the account of notes and bills in circulation on the Saturday next after the day of the issuing thereof, as if the same were then actually in circulation.

And by sect. 9, in every bond to be given pursuant to the directions of this act, the person or persons intending to issue or draw any such unstamped promissory notes and bills of exchange as aforesaid, or such and so many of the said persons as the commissioners of stamps shall require, shall be the obligors; and every such bond shall be taken in

the sum of one hundred pounds, or in such larger sum as the commissioners of stamps may judge to be the probable amount of the composition or duties that will be payable from such person or persons, under or by virtue of this act, during the period of one year ; and it shall be lawful for the commissioners to fix the time or times of payment of the said composition or duties, and to specify the same in the condition to every such bond ; and every such bond may be required to be renewed from time to time, at the discretion of the commissioners and as often as the same shall be forfeited, or the parties to the same, or any of them, shall die, become bankrupt or insolvent, or reside in parts beyond the seas.

Alteration of Partnerships.—Enactments are made to meet changes in partnership in banks, and requiring fresh securities in such cases, and enforcing the renewal of the bonds : thus, by sect. 10—

If any alteration shall be made in any copartnership of persons who shall have given any such security by bond as by this act is directed, whether such alteration shall be caused by the death or retirement of one or more of the partners of the firm, or by the accession of any additional or new partner or partners, a fresh bond shall be given by the remaining partner or partners, or the persons composing the new copartnership, as the case may be, which bond shall be taken as a security for the duties which may be due and owing or may become due and owing, in respect of the unstamped notes and bills which shall have been issued by the persons composing the old copartnership, and which shall be in circulation at the time of such alteration, as well as for duties which shall or may be or become due or owing in respect of the unstamped notes and bills issued or to be issued by the persons composing the new copartnership ; provided that no such fresh bond shall be rendered necessary by any such alteration as aforesaid, in any copartnership of persons exceeding six in number, but that the bonds to be given by such last-mentioned copartnerships shall be taken as securities for all the duties they may incur so long as they shall exist, or the persons composing the same, or any of them, shall carry on business in copartnership together, or with any other person or persons, notwithstanding any alteration in such copartnership ; saving always the power of the commissioners of stamps to require a new bond, in any case where they shall deem it necessary for better securing the payment of the duties.

And by sect. 11, if any person or persons who shall have given security, by bond, to his Majesty, in the manner hereinbefore directed,

shall refuse or neglect to renew such bond when forfeited, and as often as the same is by this act required to be renewed, such person or persons so offending shall for every such offence forfeit and pay 100*l*.

Composition with Bank of England on relinquishing Issue.—The power of the Bank of England to enter into compositions with bankers, on discontinuing the issue of their own notes, was limited to the 1st of August, 1856 (*q*), but a subsequent statute has extended the period, until parliament should prohibit the issue of bank notes, or until the privileges of the bank should be determined (*r*). Banking copartnerships, surrendering their right to issue their own notes, by agreement with the bank, do not lose the privilege of suing and being sued in the name of their public officer (*s*).

Composition in lieu of Stamp Duties.—The Commissioners of the Treasury may compound with bankers in Scotland or elsewhere for the stamp duties on promissory notes, payable to bearer on demand, and on their bills of exchange. On the composition being entered into, the bankers are entitled to issue and re-issue their notes, and draw bills on unstamped paper (*t*). A recent act has extended this provision to bankers in Ireland in respect of the duties payable on bank post bills of 5*l*. or upwards. The act is limited in its operation to bank post bills issued during three years from the 29th of July, 1864 (*u*).

Definition of Bank Notes.—What shall be deemed bank notes, within the meaning of the Bank Charter Act of 1844, and the acts regulating the issue of bank notes in Ireland and Scotland, as regards the enactments concerning stamps, has been subsequently defined by the 17 & 18 Vict. c. 83, s. 11, as follows:—

All bills, drafts or notes, other than notes of the Bank of England, which shall be issued by any banker, or the agent of any banker for

(*q*) 7 & 8 Vict. c. 32, ss. 23, 24.

(*r*) 19 & 20 Vict. c. 20.

(*s*) 27 & 28 Vict. c. 32.

(*t*) 16 & 17 Vict. c. 63, s. 7.

(*u*) 27 & 28 Vict. c. 86.

the payment of money to the bearer on demand ; and all bills, drafts or notes so issued which shall entitle or be intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts or notes shall be drawn or made : shall be deemed to be bank notes of the banker by whom or by whose agent the same shall be issued within the meaning of the above acts.

And by sect. 12, all bills, drafts and notes which by or under those acts are declared or deemed to be bank notes, shall be liable to the duties and composition for stamp duties, imposed or payable under any act or acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand ; and all clauses, provisions, regulations, penalties and forfeitures, contained in any act or acts relating to the issuing of such notes, or for securing the stamp duties and composition, or for preventing or punishing frauds or evasions in relation thereto, shall be deemed to apply to all such bills, drafts and notes as aforesaid, and to the stamp duties and composition payable upon or in respect thereof.

Form of Notes with printed Dates.—With respect to the form of bankers' notes, the 55 Geo. III. c. 184, s. 18, prohibited, under a penalty of 50*l.*, a banker issuing any promissory note, payable to bearer on demand, and liable to the stamp duties imposed by that act, *with the date printed therein*. But this enactment has been repealed by the 23 & 24 Vict. c. 111, s. 19, and there is no such restriction now existing.

*Issue of Bank Notes under 5*l.**—Bank notes payable to bearer on demand for 20*s.* or above that sum, and less than 5*l.* were prohibited to be issued or re-issued by the Bank of England or any banker in England after the 5th of April, 1829 (*x*). In Ireland (*y*) and Scotland (*z*), such notes are legal, if issued by bankers who were entitled to issue their own bank notes prior to the year 1845, and

(*x*) 7 Geo. 4, c. 6.

(*y*) 8 & 9 Vict. c. 37, ss. 8, 26.

(*z*) 8 & 9 Vict. c. 38, ss. 1, 18.

who have obtained the certificate of the commissioners of Inland Revenue, authorizing them to continue to do so. But these notes must not be for the payment of a fraction of a pound (*a*).

Foreign Banks of Issue.—These banks are regulated in their issue by the laws of the countries in which they are established (*b*). The right to regulate the coinage and issue the paper money of a state is part of its sovereign prerogatives, recognized by the law of nations, and will be protected by our Courts, when infringed or invaded. Certain persons in this country had manufactured documents purporting to be the notes of a foreign state, the Court of Chancery, at the instance of the sovereign of the state, alleging that the introduction of such notes into his dominions would cause great detriment to his subjects, directed the manufacturers to deliver up the notes to be destroyed, and the plates from which they had been manufactured, and restrained such persons from manufacturing such notes (*b*). But the Courts will not interfere with the mode in which the sovereign of a foreign state concedes or grants the right of issuing notes to others.

Therefore, where a bill was filed in the Court of Chancery against the Ottoman Bank, its directors, and the

(*a*) 8 & 9 Vict. c. 38, s. 5; 8 & 9 Vict. c. 37, s. 15. Promissory notes or bills of exchange under 20s., which are negotiable or transferable, are made void and illegal by 48 Geo. 3, c. 88, s. 2; if payable, however, to a particular person, and not to order or to bearer, they would seem to be valid. Notes or bills for 20s. or above that sum or less than 5*l.*, or on which 20s. or above that sum or less than 5*l.* remain undischarged, made, drawn or indorsed by other parties than licensed bankers, require to be in a certain form, to be payable twenty-one days after date, and to be attested under the provisions of the 17 Geo. 3, c. 30, made perpetual by 27 Geo. 3, c. 16, as to England; and by 8 & 9 Vict. c. 38, s. 17, as to Scotland; and by 8 & 9 Vict. c. 37, s. 25, as to Ireland. The 9 Geo. 4, c. 65, prohibited the circulation of these notes in England, when issued in Ireland or Scotland. But the 26 & 27 Vict. c. 105, s. 1, has repealed or suspended these restrictions as to England and Scotland for three years from the 28th of July, 1863, and the 27 Vict. c. 20, as to Ireland, for two years from the 13th of May, 1864. By 23 & 24 Vict. c. 111, s. 19, a cheque may be drawn for a less sum than 20s.

(*b*) *Emperor of Austria v. Kossuth*, 2 Giff. 628; *S. C.*, on appeal, 30 L. J., Chanc. 690.

Sultan, alleging that the Sultan's government had granted to the plaintiffs the exclusive right of issuing bank notes in Turkey, and had subsequently in derogation of that grant made a similar concession to the Ottoman Bank, and prayed for a declaration of the plaintiffs' exclusive right, and an injunction against the Ottoman Bank and its directors: it was held, that, inasmuch as the Court had no jurisdiction on the contract or concession as against the Sultan, it had none against the bank and its directors (c).

Colonial Banks of Issue.—Banks of issue in the Colonies are regulated by local laws (d), or by charters from the Crown.

Limited Banking Companies.—A banking company claiming to issue notes in the United Kingdom is not entitled to limited liability, but continues subject to unlimited liability in respect of such issue (e).

The negotiability and payment of notes will be considered in the next Chapter.

(c) *Gladstone v. Ottoman Bank*, 1 H. & M. 505.

(d) In New South Wales, by 4 Vict. No. 13; and 5 Vict. No. 24; in Queensland by 4 Vict. No. 13; and in Canada, by the Consolidated Statutes of Canada, cc. 54, 55.

(e) "The Companies Act, 1862," 25 & 26 Vict. c. 89, s. 182.

CHAPTER XXI.

BANK NOTES.

MOST questions respecting Bank of England and country bank notes may be considered together.

Bank Notes, when Money or Cash.—Wherever country bank notes have once been treated by the parties to a transaction as money, no objection can afterwards be taken that they are not so *per se* (a).

For instance, if a stakeholder receives country bank notes as money, and afterwards pays them over wrongfully to the original staker, who has lost the wager, he cannot object, in an action brought by the winner, to recover the amount won, that the notes are not money (b).

In an action to recover money lent, the payment of certain notes having been made to the defendant's credit, and the fact that he had been told the balance afterwards, were held sufficient proof that the notes were paid and had therefore been received by him (c).

So, a person to whom a sum is payable under an agreement having once received it in bank notes, without complaint or objection, cannot afterwards allege this not to be a payment under the agreement (d).

So, if the attorney of a creditor, to whom a bank bill is remitted by the debtor, writes that he will not receive it, without a sum for his costs, but does not return it, it will amount to payment (e).

A banker stands in no different position than any other

(a) *Gillard v. Wise*, 5 B. & C. 134.

(b) *Pickard v. Bankes*, 13 East, 20; *Noyse v. Price*, Byles on Bills, 10, 8th edit.

(c) *Gill v. Gillingham*, 1 F. & F. 284.

(d) *Shipton v. Casson*, 8 D. & R. 130.

(e) *Caine v. Coulton*, 1 H. & C. 764.

person, as to his own notes ; if he sues, for instance, for goods sold, the defendant cannot support a plea of tender, by showing that he had offered the amount in the banker's own notes ; he must have recourse to his set-off in respect of the notes (*f*).

Bequests.—Bank of England notes pass as “goods and chattels,” or as cash, in a will (*g*). Before they were made a legal tender, they were held to pass by a bequest of “all that shall be in my house at my death” (*h*). Country bank notes will pass under a similar general bequest (*i*).

Subject to Execution.—Bank notes, whether of the Bank of England or of private banks, may be taken in execution under a writ of *feri facias* (*j*) ; and, consequently, they are now looked upon as goods and chattels within the meaning of the statute against fraudulent conveyances (the 13 Eliz. c. 5), so that a voluntary or fraudulent gift of them is void against creditors (*k*).

Tender or Payment in.—At common law, a tender in Bank of England notes of a debt was a good tender, if the creditor did not object to receive *notes* in payment (*l*).

The same is settled of provincial bankers' notes (*m*).

Country bankers are not liable to an action, if they pay their notes, upon presentment, with Bank of England notes, so long as Bank of England notes are a legal tender everywhere, but by the Bank of England and its branches ; but they are liable, if they refuse to pay their own notes, otherwise than by other country bank notes, or if they

(*f*) *Per Parke, B., Foster v. Wilson*, 12 M. & W. 201.

(*g*) *Chapman v. Hart*, 1 Ves. sen. 271.

(*h*) *Popham v. Lady Aylesbury*, Amb. 68.

(*i*) *Mahony v. Donovan*, 14 Ir. Chanc. Rep. 262, 388.

(*j*) 1 & 2 Vict. c. 110, s. 12.

(*k*) *Barrack v. M'Culloch*, 26 Law J., Chanc. 105.

(*l*) *Grigby v. Oakes*, 2 B. & P. 526 ; *Wright v. Reed*, 3 T. R. 544 ; *Anon.*, 1 Eq. Cas. Abr. 318, 319.

(*m*) *Polglass v. Oliver*, 2 C. & J. 15.

insist on paying by any other mode than in such money or currency as constitutes a legal tender, in discharge of an ordinary debt (*n*).

Two persons resided at Darlington; one requested the other to give him change for a Sheffield Bank note, which the other did, on a Saturday evening; on Monday morning following, the bank opened for two hours, and then stopped payment; there was no evidence that the note had ever been presented for payment at the bank, but the taker of the note on the Monday sent it back, desiring a return of his money, which was refused.

The Court considered the person taking the note, under such circumstances, to be under an obligation to give prompt notice to the party from whom he took it of the stoppage of the bank, and to tender the note back to him, and that in this case he had done all that was necessary, in order to entitle him to recover the money he had given for the note; although there had been no presentment at the banker's (*o*).

Bank notes are transferable, by delivery merely, and the person transferring is *not liable* thereon, there being no indorsement to the transferee or taker.

Nor, as it appears, is he liable *on the consideration*, for which the bank note was given, if it turns out to be of no value in the transferee's hands, in consequence of the failure of the bankers, who issued and promised to pay it; for, by the delivery, without indorsement, there, *primâ facie*, has taken place a sale of the instrument; the one party hands over the goods, or whatever else formed the consideration, for paying over the instrument representing the value, or agreed price of the goods, the other party hands over the note, the whole forming one transaction; and the law does not imply that he guarantees the solvency of the bankers (*p*).

(*n*) *Grigby v. Oakes*, 2 B. & P. 526. This subject is more fully gone into under the head of *cheques*, *supra*, pp. 36, 37.

(*o*) *Turner v. Stones*, 1 D. & L. 122.

(*p*) See *per* Littledale, J., *Camidge v. Allenby*, 6 B. & C. 373.

Pre-existing Debt.—If, however, a country bankers' note is handed over on account of a previously-existing debt, the note is not considered as sold; therefore, if the note is presented in due time at the bankers', and the bankers having stopped payment, it is not paid, and due notice of the dishonour of it is given to the transferor, the transferee may have recourse to his original remedy for the antecedent debt(*q*); for the creditor is entitled to cash, and if he takes notes, that is out of favour to the debtor, and it will be inferred, without there is evidence to the contrary, that the notes were agreed not to be payment, if they turned out to be of no value, without laches in presenting, or other default of the taker. Perhaps this may be a sufficient ground upon which to rest the exception (if it is one) to the rule; but be that as it may, the exception seems to stand upon authority; though the rule is seemingly clear, that a banker's note payable to bearer on demand, delivered without indorsement, not in payment of a debt already due, but by way of a single transaction, as of an exchange for goods or for other notes, or for money (in other words *changed*), is sold to the party receiving it, who takes it with all risks, the transaction being *bonâ fide*(*r*).

In either case, whether the bank note be taken at the time of the sale, or for change, or for an antecedent debt, if the transferee can show fraud, as that the transferor knew the banker to be in a state of insolvency at the time, the former may recover from the latter(*s*).

The proposition has been said not to be generally true, that when bank notes are paid they are always paid at the risk of the party taking them, except where they are paid in respect of an antecedent debt(*t*); and there seems to be

(*q*) *Camidge v. Allenby*, 6 B. & C. 373; *Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884.

(*r*) *Fenn v. Harrison*, 3 T. R. 759; *Evans v. Whyte*, 5 Bing. 485.

(*s*) *Per* Bayley, J., *Camidge v. Allenby*, 6 B. & C. 373; *per* Bramwell, B., in *Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884.

(*t*) *Timmis v. Gibbins*, 21 L. J., Q. B. 402; 18 Q. B. 722.

no doubt that, in ordinary cases, a person asking and receiving change for a bank note, which proves worthless, is bound to return the money, if the other party is not guilty of laches.

The situation of a banker who gives an accountable receipt or credit in account, for so much money as a country bank deposited or paid in, promising to pay it, is that of a person who makes a promise on a consideration which must be taken as failing, when the note turns out not to be available to realize the money which it purports to stand for, and on a representation, though not a warranty, of its being good for which he takes it.

It is true that the accountable receipt in the one case, or the entry giving credit in account in the banker's books on the other, would be *primâ facie* evidence to show that *cash* was actually received by the bank with whom the notes were deposited; but then this receipt is shown to have been given under a mistake of fact, when it is shown to have been given under the idea that the notes were as good as money, and the bank may always show this, and that no money was ever received by them^(u). This is not a case where there was anything in the shape of a purchase of the notes.

However, the distinction has been laid down so often between taking bank notes in payment of an antecedent debt, which is not *ipso facto* extinguished, and taking them over the counter, or in immediate payment for a thing which passes at the time—that it is too much, it is submitted, to say that the general position can be shaken.

As has been noticed, when country bank notes are taken at the same time that goods are sold, or a consideration of any sort passes, all in one uninterrupted transaction, the transferor of the bank notes is not considered as guaranteeing the solvency of the banking house that issues them, and the transferee takes them for better and for worse.

(u) *Timmis v. Gibbins*, 21 L. J., Q. B. 402; 18 Q. B. 722.

But although the transferor does not, under these circumstances, take the risk of the solvency of the makers of the notes, he does in all cases (except where there is an express agreement to the contrary, or perhaps circumstances from which a jury might infer an intention to the contrary) warrant the genuineness of the instrument, and must in all such cases bear the loss, if it turns out to be forged. Thus, where a banker discounted Navy Bills for A., and they turned out to be forged, though both parties were ignorant at the time of the discount of anything being wrong, the bankers might recover against A., and so they might if they had received in payment bank notes which turned out to be forged (*x*).

Presentment for Payment at Bank.—It is not to be doubted, however, that the parties on every occasion of handing over bank notes, whether upon a consideration antecedent or concomitant, would certainly be bound by an express agreement providing for the insolvency of the maker of the notes; in either case, the party receiving the notes may stipulate—"I will not bear the loss, in case the banker has stopped payment within a reasonable time for presentment of them, and before they are paid." So in the case of a person asking another to give him change for a bank note, it must be that the note must be inferred to be taken conditionally, that the taker shall not bear the loss (*y*), provided he does all that is necessary on his part, but not otherwise; therefore, he must present the notes within due time (or, perhaps, he may return them to the person from whom he took them in due time (*z*)), in order to be discharged (*a*).

As to what is due time to present for payment a banker's

(*x*) *Fuller v. Smith*, R. & M. 49; *Smith v. Mercer*, 6 Taunt. 76; *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157.

(*y*) See *Van Wort v. Woolley*, 3 B. & C. 446, 447; *Timmis v. Gibbins*, 21 L. J., Q. B. 405; 18 Q. B. 722; *Woodland v. Fear*, 7 El. & Bl. 519.

(*z*) *Per* Lord Lyndhurst, C. B., 1 C. & M. 641, 643.

(*a*) See *Rogers v. Langford*, 1 C. & M. 637; *Henderson v. Appleton*, cited *Id.* 642.

note, after the receipt of it, various cases have been decided. A. sent his servant to a town, fourteen miles from his residence, to sell cattle; the servant sold them, and took country bank notes in payment from B. (this was about one o'clock on a Friday afternoon), and paid them over to his master (who had been from home the whole of Friday) on settling with him on Saturday evening. A. presented the notes the following Monday morning at the banking house, when it was found that the bank had stopped payment on the previous Saturday, between three and four o'clock. Under these circumstances, the Court considered that A. was entitled to recover from B. the amount of the notes, as A. had not been guilty of such laches, by not presenting the notes on Saturday morning, as made the notes his own, but intimated that the result would probably have been different if the servant had been identified with the master (*b*). It seems if the master had himself sold the cattle, and taken the notes for them, in one uninterrupted transaction, he would at once have made his election to take the notes as payment, according to the doctrine above stated, so that, independently of the question of laches, he must, in that case, have borne the loss. The Court, if the case is duly reported, does not seem to have had present to their minds the distinction between giving bank notes, in completion of a sale, and giving them in discharge of a precedent debt.

It is quite clear in general, that in case of a country bank note, made payable at the banking house, there must be a presentation for payment there, before a right of action arises (*c*), and merely alleging the insolvency of the house as a reason for nonpresentment is impertinent; nor will a declaration by the banker, that he will not pay his notes, dispense with presentment (*d*); the note must be presented, and a demand of payment made at the banking

(*b*) *James v. Houlditch*, 8 D. & R. 3.

(*c*) *Saunderson v. Bowes*, 14 East, 500; *Dickenson v. Bowes*, 16 East, 110.

(*d*) *Howe v. Bowes*, 5 Taunt. 30.

house, unless the banker has discharged the holder from presentment and demand (*d*); nor is it a sufficient excuse to say that the banker was from home, had absconded, and left no effects at the banking house (*e*).

If bank notes be transferred in payment of a debt, and it turns out that, at the time of the transfer, though unknown to the creditor, the bankers had already stopped payment, and were insolvent, and there was no presentment at the banking house, and demand of payment, on the one hand, but, instead, the holder, within a reasonable time, gave the party handing over the notes, notice of this fact, and offered to return them, which they refused, this is a sufficient foundation to entitle the transferee to recover in an action for the original consideration, for which the notes were transferred (*f*).

The presentment, if made, must be in a reasonable time; there must be no laches, otherwise the holder is considered as making his election thereby to take to the notes (*g*). In cases between a holder of bank notes, and the party from whom he has received them (not being the makers), it seems that to go through the form of presentment is always immaterial, after insolvency, and stoppage by the bankers, provided that within a reasonable period—a period for this purpose may be reasonable, which, nevertheless exceeds the time within which presentment ought to have been made—the transferee gave the other party notice that the notes were valueless, and offered to return them (*h*).

There is, however, a distinction between the situation of a person with whom notes are deposited, and one to whom they are paid, in discharge of an antecedent debt, in the event of the notes being worthless: thus, if A. deposits

(*d*) *Howe v. Bowes*, 5 Taunt. 30.

(*e*) *Sands v. Clarke*, 8 C. B. 751.

(*f*) *Robson v. Oliver*, 10 Q. B. 704.

(*g*) *Camidge v. Allenby*, 6 B. & C. 373; *Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884.

(*h*) *Per Erle, J.*, 10 Q. B. 717.

notes of a country bank with another country bank, taking the accountable receipt of the latter for the sum represented by the notes, and it turns out that the notes are worthless, and the bank, as soon as they learn this, gives notice to the depositor, and offers to return the notes, but are refused, neither the bank nor the depositor being aware at the time of the deposit, that the bankers, who made the notes, had then stopped payment; the depositor cannot have an action against the banking house with whom the notes were deposited, either for money lent, or money had and received (*i*).

Notice of Dishonour.—The same rule as to notice of dishonour of bills of exchange, and notice of dishonour of country bankers' notes, has always prevailed; the rule is, it must be given by the post which leaves on the day following that on which the holder gets information of the fact.

An illustration of this position is afforded under the following circumstances.

A., being previously indebted to B. in 500*l.*, on a Friday, about eight or nine a.m., paid to B., at his residence, at Wantage, 490*l.* in notes of the Newbury Bank, and 10*l.* in a note of the Wantage Bank, B. giving him a receipt for 500*l.* on the back of a promissory note, by which the loan had been secured.

B. immediately sent 450*l.* of the notes to his bankers at Wantage, with orders to transmit the Newbury Bank notes (which were made payable on demand at the bank at Newbury, or at the bank of Messrs. Barnard & Co., London) to London, to buy an Exchequer bill. Wantage is distant from Newbury about eighteen miles, and was a two days' post from one place to the other: the post left Wantage for London at half-past five o'clock, p.m., every day, *except Saturdays*.

When B.'s messenger got to the bank, and delivered his

(*i*) *Timmis v. Gibbins*, 21 L. J., Q. B. 403; 18 Q. B. 722.

message, with the above order, one of the partners said it would be dangerous to send the notes to London, and, therefore, declined or refused to send them by post that evening, but offered to enclose them on the Saturday evening, in their packet which they usually sent in the course of their business as bankers, two or three times a week, by the coach, to London, and which packet, he said, would be in London on Monday. This was ultimately agreed to, and on the Saturday evening 450*l.* of Newbury Bank notes were, by the bankers at the Wantage Bank, cut in halves, and one set of halves enclosed in their packet, and transmitted the same evening to London. They usually sent their notes half by the coach, and half by the post, and the other set of halves was sent by post on the Sunday evening, addressed to the London correspondents of the Wantage Bank ; these halves reached them between ten and eleven a.m. on the Monday, and the packet, containing the other halves, was delivered to them somewhat later the same day.

The Newbury Bank stopped payment the same morning, but their correspondents in London, Messrs. Barnard & Co., continued to pay the Newbury notes the whole of Monday, but not afterwards, and the notes in question would have been paid if they had been presented in the course of Monday. When they were presented to Barnard & Co. on Tuesday, they were dishonoured.

Notice of the stopping of the Newbury Bank being communicated to B. on the evening of Monday, he immediately sent a messenger to A.'s house, who stated it to A.'s wife, A. himself having gone to bed ; A., the same evening, said he would take the notes again, and return them to the person from whom he had received them. He afterwards refused to take back the notes.

In an action against him by B., it was held that B. was entitled to recover, for that if the notes had been sent direct by the post to Newbury, they would not have been paid, as the bank had stopped on the Monday ; and that

sending the half notes to London was a reasonable precaution, and one which, therefore, B. had a right to adopt(*k*).

Exchanging Notes.—It is a custom among country bankers who reside in the same district to exchange each other's notes once or twice a week, something after the same plan as that adopted at the London or country clearing house with respect to cheques.

This is a great convenience to all parties, and has the same effect as the practice with respect to the clearing house, in lessening the amount of bank notes or gold required for the circulation of the district; it also operates as a check to a redundancy of issues, by any particular bank, within the district.

The notes of such bankers as reside beyond the district, when they come into the hands of the bankers within the district, are not sent to the issuers of them, but are sent at once to London, for the purpose of being presented for payment to the bankers to whom they are addressed, or upon whom they are drawn.

Bankruptcy of Country Banks.—Where one of two country banks became bankrupt, each at that moment having in their hands bank notes of the other, which together with other securities were reciprocally of nearly the same amount, and the assignee of the bankrupt house knowing this presented the notes, and obtained payment of them from the solvent bank at their London agents, who were unaware of the relative situation of the two banks, the money was held to be recoverable by the solvent bankers from the assignee, it being shown, that, on the balance of accounts between the bankers, not only was nothing owing by the solvent bank, but that there was a sum of 22*l.* in their favour(*l*).

(*k*) *Williams v. Smith*, 2 B. & A. 496.

(*l*) *Edwards v. Newman*, 1 B. & C. 418.

A country bank consisted of two partners, A. and B. B. committed an act of bankruptcy, and became bankrupt, at a time when another bank in the country held bank notes of theirs, payable at the house of R. & Co., the correspondents, in London, of the country bank first referred to. These notes were presented to R. & Co. for payment, but a part only was paid by R. & Co. out of the funds of A. and B. in their hands, A. paying the residue, by indorsing to the country bankers a bill of exchange, given by a debtor to the firm of A. and B., for a larger amount, which they consented to take in payment, and when due it was paid to the latter bank by the acceptors. Afterwards A. committed an act of bankruptcy, and a joint commission issued, and the assignees claimed from the second country bank the proceeds of the bill, and also the sum paid on the bank notes by R. & Co., on the ground that the partnership having been dissolved by the act of bankruptcy of B., of which A. had notice, he was not competent to dispose of the partnership property.

The Court held, that as A. had done no more than satisfy a claim, which was complete at the time of the bankruptcy of B., as he was warranted in doing, the action was premature, until an account had been taken in equity, and it was ascertained whether there was a balance against B. or not—that it was impossible to contend that a partnership, when one partner commits an act of bankruptcy, must immediately shut up the house—and that A.'s having acted in making the payment, with a knowledge of the act of bankruptcy of B., made no difference (*m*).

Messrs. Forsters, bankers at Carlisle, had an agreement with Surtees, bankers at Newcastle-upon-Tyne, by which Forsters were weekly to transmit to the Newcastle Bank all the notes of the Newcastle Bank, and certain other specified banks, which they, Forsters, might have in their

(*m*) *Harvey v. Crickett*, 5 M. & S. 335; *Woodbridge v. Swann*, 4 B. & Ad. 633; *Morgan v. Morgan*, 9 Exch. 145; 23 L. J., Exch. 21.

possession; and the Surtees were, in exchange every week, to return to the Carlisle Bank; and any balance on one side or the other was to be made up by that party drawing a bill on a banker in London, at twenty days, in favour of the other party. On these facts, the bank notes so sent by Forsters were held to constitute a debt from Surtees to the Carlisle Bank, which Surtees might pay by a return of bank notes under the agreement; but if they made no such return, or a return short of the amount due, and gave no bill for the balance, such balance was a debt against them, which was proveable under a *fiat* against Surtees (*n*).

The Newton Abbotts Bank advanced to A. 500*l.* upon the security of his promissory note, payable on demand, with interest, and dated 7th November, 1840. On the 17th of July, 1841, the bank stopped payment, at which time A. held bank notes, and interest notes of the bank, to the amount (with the interest due on the notes) of 581*l.* 5*s.*, being more than sufficient to have paid and discharged A.'s promissory note and interest; in fact, he had collected such notes expressly for the purpose of taking up, and paying his promissory note with Newton Bank notes; and for these, he alleged, that he had given full value.

The bank subsequently, without notice to A., deposited his promissory note, together with other securities, with Messrs. Williams, their correspondents in London, for the purpose of securing the repayment of such sums of money as they might advance to the Newton Abbotts Bank, and Williams & Co. held, on the whole, securities belonging to the Newton Abbotts Bank to a greater amount than the balance due to them from the Newton Abbotts Bank.

Williams & Co. compelled A. to pay the amount of his promissory note and interest to them, and refused to allow him to set off the notes of the Newton Abbotts Bank which he held.

A., in ignorance of the fact that Williams & Co. held

(*n*) *Forster v. Surtees*, 12 East, 605.

securities to a greater amount than the balance due to them, afterwards proved under the bankruptcy for the bank notes which he held.

The assignees of the Newton Abbotts bankers paid Williams & Co. what was due to them, after having credit for the sum paid by A. on the promissory note, and took from Williams & Co. all the remaining securities.

As A. would have had a right of set-off against the bankrupts, if he had continued in possession of the promissory note, he could not be deprived of that right by his ignorance of the state of accounts between Williams & Co., and the bankrupts, and so the Court held the assignees to be bound, on his withdrawing his proof, to repay to him the amount of his promissory note, on his giving up Newton Abbotts Bank notes to the same amount (o).

Proof.—With respect to proving in bankruptcy, upon the bank notes of a bankrupt, the following points have been settled.

It has been questioned, whether a claim founded on notes of a country banker, payable on demand, when no demand has been made, would support a *fiat* against the banker; but, at any rate, it seems clear, that when such notes have been given in payment of an antecedent debt, the creditor may rely on that debt, if the notes are really worthless (p).

A partner in a bank, who signs the bank notes “For A., B., &c.” (stating *all* the names in the firm, and appending his signature,) cannot, on the bankruptcy of the partnership, be liable to proof against his separate estate, on such note (q).

A person buying up bank notes of a firm, after its bankruptcy, cannot prove for them, unless he shows that the vendors of them were severally entitled to prove, in respect

(o) *Ex parte Staddon*, 3 M. D. & De G. 256.

(p) *Simpson v. Sikes*, 6 M. & S. 295, 312.

(q) *Ex parte Clarke*, 1 De Gex, 153; 14 M. & W. 469.

of the notes they sold (*r*); but, a person owing a debt to a banking house may, even after they have actually stopped payment, buy up their bank notes, for the purpose of setting off their amount against his debt to them, not having at the time notice of an act of bankruptcy by either of the members of the firm (*r*); but he could not set off notes, taken after he knew of an act of bankruptcy by *some* of the partners (*s*).

One person may prove, on behalf of a large number of creditors, each holding notes of the bank, under similar circumstances with himself, provided that he does not attempt to interfere in the choice of assignees, or with the certificate (*t*); but these modes of proof are only allowed where necessity or consent is the foundation; Lord Eldon, in one case, required the proof to be made in the name of every one of 500 partners (*u*).

Lost Notes.—Bank of England notes cannot be followed by the legal owner into the hands of a *bonâ fide* holder for good consideration without notice; and the holder of a Bank of England note is, *primâ facie*, entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, and therefore payment cannot be refused, when it is presented, unless the bank can show that he was privy to the fraud (*x*).

If A. pays a bank note to B., who pays it, in discharge of a debt, to C., who presents it at the Bank of England, where it is stopped, on the ground that it has been fraudulently obtained; and then A. pays the amount to C., in consideration that his debt, due from B., had not been discharged, partly through his (A.'s) means; still A. cannot

(*r*) *Ex parte Rogers*, Buck. 490; *Ex parte Delawar*, 3 Ir. Eq. R. 573.

(*s*) *Dickson v. Cass*, 1 B. & Ad. 343; *Hawkins v. Whitten*, 10 B. & C. 217.

(*t*) *Ex parte Gordon*, 1 Mont. & A. 282; *Ex parte Keys*, 9 L. J., Chanc. 11.

(*u*) *Ex parte Bank of England*, 2 Glyn & J. 362.

(*x*) *Solomons v. Bank of England*, 13 East, 135, n.

recover in trover against the Bank of England (*y*). The stopping payment does not appear to be a duty, but is merely an accommodation rendered to the public.

A money changer, changing a Bank of England note, which had been stolen, but giving full value for it, taking it *bonâ fide*, not having at the time knowledge that it had been stolen, is entitled to recover from the bank the amount of the note, although he had the means of knowledge, if he had taken proper care of certain notices, advertising its robbery, which had been previously delivered to him.

The money changer carried on business in Paris; change was given by him for the note there; and he had received, some time before, a printed advertisement, stating this note, among others, to have been stolen from Messrs. A., in England; the note was changed about the middle of the year next following that in the course of which he had received the notice (*z*).

If the owner of a banker's note, which has been lost or stolen, stop the payment on that ground, and then demand that the amount shall be paid to him, the banker has a right to require an indemnity against the demands of any future bearer, who may present it for payment, before he pays the true owner; for the banker would not be able to dispute the right of any future bearer, who came fairly by the note to payment, and, therefore, he is entitled to be indemnified against the contingency of the note being presented by such a bearer (*a*); and this seems to be a direct consequence of the law as laid down in a case, where the holder of a stolen Bank of England note for 500*l.*, who took it in Paris, *bonâ fide*, and for full value, was held entitled to recover, even though he took it under

(*y*) *Benjamin v. Bank of England*, 3 Camp. 417. The bank is in the practice of stopping the payment of a note that it has notice has been stolen, upon receiving an indemnity from the applicant, and this has been declared to be a reasonable practice. *Miller v. Race*, 1 Burr. 460; see 4 A. & E. 36.

(*z*) *Raphael v. Bank of England*, 25 L. J., C. P. 33; 17 C. B. 161.

(*a*) *Walmesley v. Child*, 3 Burr. 1524.

circumstances showing negligence (*b*); for if such holder has a right to receive from the banker the amount of the note, to lay down that the banker is bound to pay the amount to the true owner, in the first instance, would be to expose him to very serious risk of being obliged to pay the amount twice over.

Now, as nothing that has been done or omitted by the true owner, or by the innocent holder for value, can make it just that the banker should incur any liability greater than that which he contemplated in making the note, viz., to be bound to pay the amount of it, the question, as between the original owner and innocent holder for value, must be decided by reference to the rule:—where one of two innocent parties must bear a loss, that loss is to fall on the party who has, by his conduct, given rise to it; and this is the party who has allowed the note to be lost or stolen from him; or, if it be said, the loss or theft was an accident beyond his control, and such an event as no human foresight could provide against or prevent, still there is no reason that a party who has no share in causing an accident should be made to suffer, or to repair the consequences of it (*c*).

To support an action by an owner of lost bank notes, against persons who have got them into their hands, without giving value, it is not absolutely necessary for the plaintiff to give direct evidence of the loss; if such circumstances are shown as to satisfy a jury of the fact of the loss, that is sufficient (*d*).

A notice of the loss of bank notes is not to be considered as of continuous or perpetual force; and, unless such notice is renewed, it will be a question for the jury in an action by the owner to recover the lost notes, whether, if the party heard no more of the matter for a year or more, he

(*b*) *Raphael v. Bank of England*, 25 L. J., C. P. 33; 17 C. B. 161; see *Shee v. Clarke*, Cowp. 200, accord.

(*c*) See *per* Lord Mansfield, C. J., 3 Burr. 1525, *per* Wilmot, J., 1526.

(*d*) *Holiday v. Sigil*, 2 Car. & P. 176.

might not fairly infer that the notes had been recovered or restored (*e*).

If a bank note be lost or stolen out of a letter put into the post-office no action lies to recover it, or its value, at the suit of the loser, against the Postmaster-General (*f*).

On the trial of an indictment for forgery, the loss of the bank note, alleged to have been forged, is not necessarily a bar to a conviction; thus, where a prisoner swallowed the bank note that he was indicted for having forged, it was held, that he might have been convicted without the production of the bank note (*g*).

Halves of Notes.—The practice of cutting notes in halves for the purpose of transmission by post is legal (*h*). If A. cuts a note in halves, and sends one-half by post to B., retaining the other half, upon a condition which B. does not perform, the other half so sent belongs to A., and he may recover it from B. (*i*).

Indemnity on Loss.—It seems, that the owner of a *destroyed* note could not recover in an action against the makers; or, at least, it may be said to be a question not wholly without doubt (*k*), and he was practically obliged to have recourse to a Court of Equity in most instances. The production of the note was essential to his right to recover. But now it is enacted, that in case of any action founded on a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge, to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court or judge, or master, against the

(*e*) *Snow v. Leatham*, 2 Car. & P. 314.

(*f*) *Whitfield v. Lord Le Despencer*, Cowp. 754.

(*g*) *Anon. Buller, J.*, cited 2 Camp. 211.

(*h*) *Redmayne v. Burton*, 2 L. T., N. S. 324.

(*i*) *Smith v. Mundy*, 29 L. J., Q. B. 172.

(*k*) *Hansard v. Robinson*, 7 B. & C. 90.

claims of any other person upon such negotiable instrument (*l*).

A bank note is a negotiable instrument within the meaning of this provision, and a banker, upon an indemnity being given, will be restrained from setting up the loss, as a defence to an action upon the note (*m*).

If half of a note was lost, it was the rule, apparently, not to allow the owner of the other half to recover, if he could not either produce an entire note, or prove that the other half had been actually destroyed (*n*); but the above statute will be equally applicable in this case, if indeed it would not, independently altogether, be a good defence for the bankers to show, that they had paid the amount once to the original owner of the whole note, upon his presentment of his half; for although the holder of the lost half might show that it came to his possession *bonâ fide*, still it is said, that the taker of a half note necessarily takes it under suspicious circumstances, and he is not bound to take the half note at all; he ought to bear the loss, it seems (*o*).

Rights of Finder.—Where A. had picked up some bank notes on the floor of B.'s shop, and handed them over to B. (who was not aware of the notes having been on the floor) to keep till the owner should appear; and B. caused advertisements to be inserted in various newspapers, but no one appeared to claim them; and three years elapsed, and then A. requested B. to return them, tendering the costs of the advertising, and offering an indemnity; and B. refused.

(*l*) 17 & 18 Vict. c. 125, s. 87. The benefit of this provision is confined to a plaintiff suing on a lost note in one of the superior Courts of common law, and does not apply to his suing in the County Courts or other inferior Courts, unless an order in council has extended the statute to these Courts. *Noble v. Bank of England*, 2 H. & C. 355; 33 L. J., Exch. 81.

(*m*) *M'Donnell v. Murray*, 9 Ir. Com. Law Rep. 495.

(*n*) *Mayor v. Johnson*, 3 Camp. 324.

(*o*) See Bayley on Bills, 379, 6th edit.; Willes, J., in *Redmayne v. Burton*, 2 L. T., N. S. 324, said, "My opinion is that bankers would be liable to pay without an indemnity, as any person taking half a note would take it with notice."

A. was held entitled to recover the notes in trover against B. (p).

It is very important, in case of a loss of bank notes, to bear in mind the general principle : if a person finds lost property, and keeps it, having, at the time of finding it, no means of discovering the owner ; he is not guilty of larceny, because he afterwards has means of finding the owner, and, nevertheless, retains the property to his own use (q).

If the finder had seen the notes drop from the owner's pocket ; or, if the notes had had the name of the owner written upon them ; or, if there had been other similar circumstances, to enable the finder to know who was the owner, at the moment he picked up the notes, that would have been different (q).

Even if a finder instantly appropriates the note, *animo furandi*, but under such circumstances as to warrant a jury in finding, that, at the time of the appropriation, he really believed that the owner could neither find the note nor be found himself, such appropriation is not larceny (r).

In case of a note being marked, or inscribed, so that the real owner might be found, it seems, there must be proof that the prisoner can read these marks, &c., before he can be convicted (s), or that he got them read to him.

Old Rule.—Under the law, as formerly understood, it was considered, that the rights of the transferee might be affected by the degree of caution that he used in taking the note. Thus the following cases were decided :—

The porter of a banking house had stolen from him a 30*l.* Bank of England note, as he was passing with it in his pocket, on an errand of his masters' ; they duly advertised the loss, and, after some delay, traced the note to the possession of a horse dealer ; on the bankers suing him,

(p) *Bridges v. Hawkesworth*, 21 L. J., Q. B. 76 ; 15 Jur. 1079.

(q) *Reg. v. Dixon*, 25 L. J., M. C. 39.

(r) *Reg. v. Thurborn*, 1 Den. C. C. 388, 395, 396.

(s) *Reg. v. Preston*, 2 Den. C. C. 353.

to recover the note, or its value, it was left doubtful, on the evidence, whether he had admitted receiving it from his bankers, or from a stranger, at Doncaster races, for bets won; but, at any rate, it appeared, that he had made no inquiry, and had not taken the number of the note; and the jury having found a verdict for the bankers, the Court granted a new trial (*t*).

A person was robbed on the 23rd of December, 1825, of his pocket-book, containing a bill of exchange, drawn by bankers, at Canterbury, on, and accepted by, bankers, in London, dated the 21st of November, 1825, payable thirty days after sight; on the 26th of December he advertised his loss, stating, in the advertisement, the contents of the pocket-book to be of no use to any but the owner; on the 30th of December, he gave notice to the acceptors, and requested them to stop the bill; on the 29th of December the bill was presented at the Maidstone Bank, by a stranger, who said he was the son of the indorser, and the amount was thereupon paid in the notes of that bank. In an action by the loser, against the Maidstone bankers, it was held, that the proper questions for the jury were, whether the plaintiff had used due diligence in making public his loss; and whether the bankers had acted with good faith and proper caution in cashing the bill (*u*).

So, where the plaintiff left in a hackney coach, and lost a bank post bill for 100*l.*, and dispersed among the hackney coach stands hand-bills, describing and offering a reward, and also advertised in the Morning Advertiser of the 24th of September, about eight days after her loss, and early on that day a stranger presented the bill at a banking-house at Brighton, and, on being asked his name, said he was going

(*t*) *Snow v. Saddler*, 3 Bing. 610. In another case, where the porter of the same bank was robbed of a 500*l.* Bank of England note, and it was cashed at a branch bank, situate at an obscure place, called Bourne, in Lincolnshire, of the defendant's bank, at Sleaford; and that without asking any questions of the person presenting the bill, and who was a stranger, it was held that the Sleaford bankers were liable, due advertisement having been made. *Snow v. Peacock*, 3 Bing. 406.

(*u*) *Beckwith v. Corral*, 8 Bing. 444.

a journey, and wrote on the bill, in a very illiterate hand, a name and address, and the banker, not having heard of the loss, cashed the bill, taking the usual commission; the question being left to the jury, nearly as above stated, and a verdict being found for the plaintiff, the Court held the banker to be liable (x).

Present Rule.—But the law has been laid down in different terms, and the Courts have shown a desire to retrace some of the steps that led to these decisions. Even gross negligence in taking a note is not now of itself a reason why a holder for value should suffer. Thus, where six Bank of England notes, for 500*l.* each, were stolen in November, 1852, from Brown & Co., in Liverpool, who immediately published notices of the robbery, and of the numbers of the notes, in the French and English languages, and circulated them in England, France, and other countries; fresh notices to the same effect being published in April, 1853; one of these last notices was left in due course, in 1853, at the place of business of one St. Paul, a money changer in Paris. In June, 1854, a stranger entered the shop, and asked what was the exchange of the day, and produced a 500*l.* Bank of England note; the file of notices, kept in the shop, was not looked at; but the stranger was asked to write his name, and to produce his passport, and St. Paul finding the name so written, and that in the passport, to agree, gave change for the note, at the current rate of exchange; St. Paul then remitted the note to his correspondent in London, who presented it at the Bank of England, and was refused payment, but the bank was held bound to pay, on the ground that a party taking a negotiable instrument *bonâ fide*, and for full value, is entitled to recover on it, although it has been stolen, and he took it negligently (y).

(x) *Strange v. Wigney*, 6 Bing. 677.

(y) *Raphael v. Bank of England*, 25 L. J., C. P. 33: 17 C. B. 161; *Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 35.

Forgery.—As regards forging and passing bank notes, knowing them to be forged, it is enacted by 24 & 25 Vict. c. 98, s. 12, that whosoever shall forge or alter, or shall offer, utter, or dispose of, or put off, knowing the same to be forged or altered, any note, or bill of exchange, of the Bank of England, or of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on, or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony (z).

A *conditional* uttering has the criminal qualities of any other uttering; thus, where the prisoner gave a forged acceptance, knowing it to be so, to the manager of a bank, where he kept an account, saying he hoped this bill would satisfy the bank, as a security, for the balance he owed them; this was holden a sufficient guilty uttering (a).

When the authority of a banking company, to draw and issue notes, is recognized by statute, it is not necessary to prove it by the charter or otherwise (b).

On an indictment for disposing and putting off forged bank notes, knowing them to be forged, the prosecutor has a right to give in evidence the fact of other forged notes having been uttered by the prisoner, for the purpose of proving his knowledge of the notes in question being forged also (c), and delivering to another person a forged bank note, to be put off or passed by the latter is a “disposing of and putting off,” within the statute (d).

Purchasing or receiving forged bank notes, knowing them to be so, is felony (e).

(z) By the above statute the punishment on conviction is penal servitude for life, or for a term not exceeding five years (by 27 & 28 Vict. c. 47, s. 2), or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

(a) *Reg. v. Cooke*, 8 Car. & P. 582.

(b) *Rex v. M'Keay*, 1 Mood. C. C. 130.

(c) *Rex v. Wylie*, 1 N. R. 92.

(d) *Rex v. Palmer*, 1 N. R. 96.

(e) 24 & 25 Vict. c. 98, s. 13.

Engraving Plates for Bank Notes.—It is also felony to engrave plates for the notes of the Bank of England or of Ireland, or of bankers, or to manufacture or sell paper resembling the paper used by the Bank of England or Ireland for their notes or bills, or their watermarks, without authority (*f*).

Larceny.—As regards the stealing of bank notes, where a person intercepted notes at a post office, which were in course of transmission from one branch of a banking company to another (at which they had been issued), he may be found guilty of larceny of the notes described as money, though they were not in circulation at the time (*g*).

Obtaining Money or Goods by means of forged or worthless Notes.—If a person gives forged country bank notes in payment for goods, and, when the seller objects to receive them, assures him they are good, knowing them at the time to be valueless, he is indictable for cheating and defrauding the seller of the goods; but the evidence, to show the notes to be bad and worthless, must be clear and full. In a case where there was some evidence to show that the bank, of which the paper in question purported to be the notes, had stopped seven years previously; and the notes appeared to have been exhibited under a commission of bankrupt against that bank; the words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them; the notes had never been presented for payment at the bank, or at Sir J. Esdaile's, in London, where they were made payable: the judges held the evidence insufficient to show the notes to be bad (*h*).

So, it is not sufficient to show the bankruptcy of two

(*f*) 24 & 25 Vict. c. 98, ss. 14—18.

(*g*) *Reg. v. West*, 26 L. J., M. C. 6; 7 Cox, C. C. 183.

(*h*) *Rex v. Flint*, R. & R. 460.

out of three partners in a bank, and the shutting up of the house; for the third, being solvent, the note, if presented to him, may perhaps be paid (*i*). So, even where the bank had ceased business twenty years before, and the note uttered was old, discoloured and dated many years before the time of giving it, and had been regularly cancelled and withdrawn from circulation, the makers having traced a large cross over the face of it; but the proceedings in bankruptcy against the bankers were not produced; the prisoner, though he gave a false address when asked, it was considered could not be convicted of a false pretence, as there was no evidence to go to the jury of his knowing the note to be cancelled and unavailable at the time he uttered it (*h*).

A person passing a note of a country bank for 5*l.*, payable on demand, as a good note, and as of the value of 5*l.*, knowing that the bank is insolvent and has stopped payment and cannot pay the note in full, may be indicted for obtaining money by false pretences (*l*).

A person fraudulently offered a 1*l.* Irish bank note as a note for 5*l.*, and obtained change as for a 5*l.* note. The person cashing it could not read, and the note upon its face clearly afforded the means of detecting the fraud, it was held, that this was obtaining money by means of false pretences (*m*).

It is now a felony for any one, with intent to defraud, to demand, receive or obtain, or procure to be delivered or paid to any person, or to endeavour to receive or obtain, or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under or by virtue of any forged instrument, knowing the same to be forged (*n*).

(*i*) *Rex v. Spenser*, 3 Car. & P. 420.

(*h*) *Reg. v. Clark*, 2 Russ., C. & M. 296, n.

(*l*) *Reg. v. Evans*, 29 L. J., M. C. 20.

(*m*) *Reg. v. Jessop*, 27 L. J., M. C. 70.

(*n*) 24 & 25 Vict. c. 98, s. 38.

CHAPTER XXII.

BANK POST BILLS.

QUESTIONS often arise respecting bank post bills in the course of the business of bankers; we shall, therefore, devote a word or two to the subject.

Bank post bills are instruments in common use among bankers for the remittance of money to persons in the country, or abroad. They are payable to order, and at a certain number of days after sight(*a*). When indorsed by the payee they become payable to bearer, and are negotiable as other bills or notes, until ultimately paid by the bankers issuing them. The peculiar quality of a bank post bill is its safety and facility as a medium of transmitting money to a distance.

Bank post bills issued in London by the Bank of England are not by law payable at the branches in the country; but they are usually cashed at the branches, or by bankers, for a commission(*b*).

Giving cash for a bank post bill is a payment, within the protection of the Bankruptcy Act(*b*), provided it is *bonâ fide* made to the bankrupt before the filing of a petition for adjudication of bankruptcy, and without notice of an act of bankruptcy. They are considered as ready money when unobjected to on the score of being drafts(*c*).

(*a*) Form of bank post bill, in *Willis v. Bank of England*, 4 A. & E. 22, n., and in *Forbes v. Marshall*, 11 Exch. 167; 24 L. J., Exch. 305. In the latter case, Pollock, C. B., Alderson, B., and Platt, B., considered them to be bills of exchange, but Martin, B., however, thought them to be promissory notes. The Bank of England has issued bank post bills since the year 1738.

(*b*) 12 & 13 Vict. c. 106, s. 133; *Willis v. Bank of England*, 4 A. & E. 21.

(*c*) *Caine v. Coulton*, 1 H. & C. 761.

CHAPTER XXIII.

EXCHEQUER BILLS.

It may be useful to refer to the law regulating the issue and currency of exchequer bills (*a*). We have seen that they are negotiable instruments, payable to bearer, and pass by delivery. They may, however, be made payable to order, by filling in the blank with the name of the payee, in which case they are only transferable by his indorsement (*b*). They are subject to the general lien of bankers, unless deposited by a customer with his bankers for a special purpose, as, for instance, to get the interest upon them, or to exchange them for new bills (*c*). If bankers make advances on a deposit of exchequer bills, which turn out to be forgeries, they will be entitled to recover back their advances immediately upon the bills being repudiated at the Exchequer (*d*).

The bills are issued annually, under the direct authority of parliament, for money advanced for the use of the government, in anticipation of the receipt of the ordinary revenue, and are made a specific charge upon the consolidated fund of the United Kingdom or its growing produce (*e*). Cash under the control of the Court of Chancery

(*a*) The 24 Vict. c. 5, is the statute which regulates the issuing and paying off Exchequer bills since the 15th of April, 1861. The former statutes were the 48 Geo. 3, c. 1; 4 & 5 Will. 4, c. 15, and 5 & 6 Vict. c. 66, as to the bills issued before that period.

(*b*) *Wookey v. Pole*, 4 B. & Ald. 1.

(*c*) Ante, 273.

(*d*) *Bank of England v. Tomkins*, 6 Jurist, 348. On the discovery of the extensive forgeries of Exchequer bills, which were committed by Beaumont Smith, a clerk in the Exchequer Office, in the year 1842, a commission of inquiry was directed by the 5 & 6 Vict. c. 11, to issue, with instructions to the commissioners to report upon the circumstances under which the bills had been issued, and the holders became possessed of them. Afterwards the Treasury was authorized by the 6 & 7 Vict. c. 1, to pay the *bonâ fide* holders of these forged documents.

(*e*) 24 Vict. c. 5, s. 2.

may be invested in exchequer bills(*f*). They are receivable in payment of government taxes or duties(*g*).

The bills are prepared and made out at the receipt of the Exchequer, and may be in such form, with coupons for interest, as the Commissioners of the Treasury may think most safe and convenient, and may contain one common sum or different sums for the principal moneys(*h*). They must, however, be signed by the Comptroller-General of the Exchequer, or by the Assistant Comptroller, in his own name, and his authority to do so in either case must be duly notified in the London Gazette, before the bills are signed or put into circulation(*h*).

The rate of interest varies, but it cannot exceed at any time 5*l.* 10*s.* per cent. per annum, and is payable half-yearly at the Bank of England(*i*).

Fractions of a penny for interest are not allowed(*k*).

Before current bills can be paid off, notice must be given in the London Gazette(*l*).

Bills defaced by accident may be renewed(*m*). With regard to the recovery or replacement of lost or destroyed bills, it is specially provided(*n*), that, on proof by oath being made before the Lord Chief Baron, or other Baron of the Court of Exchequer, that an exchequer bill has by casualty or mischance been lost, burnt or otherwise destroyed, before being paid off or discharged, and the number and amount being ascertained, and the Chief or other Baron certifying that he is satisfied with the sufficiency of the proof, the Commissioners of the Treasury are authorized to pay the bill and interest. But security to repay the money is to be given, in case the bill should be afterwards produced(*n*).

(*f*) Can. Ord., March, 1861, 7 Jur., N. S. 58, Part I.

(*g*) 24 Vict. c. 5, ss. 5, 6.

(*h*) *Id.* s. 1.

(*i*) *Id.* s. 3.

(*k*) *Id.* s. 15.

(*l*) *Id.* s. 4.

(*m*) *Id.* s. 12. A similar provision is contained in the 48 Geo. 3, c. 1, s. 18.

(*n*) *Id.* s. 13.

Forging or counterfeiting an exchequer bill or a coupon, or an indorsement, or tendering a forged bill in payment of a debt, is felony (*o*). So is the manufacturing of paper, plates or dies in imitation of those in use for exchequer bills (*p*). Having the possession of such paper, plates or dies unlawfully, is a misdemeanor (*q*).

(*o*) 24 Vict. c. 5, s. 13; 24 & 25 Vict. c. 98, s. 8.

(*p*) 24 Vict. c. 5, s. 18; 24 & 25 Vict. c. 98, s. 10.

(*q*) 24 Vict. c. 5, s. 19; 24 & 25 Vict. c. 98, s. 11.

CHAPTER XXIV.

COUPONS.

COUPONS are sometimes deposited with bankers, as securities for advances to their customers, but more frequently to receive the interest due on them. Coupons of foreign and colonial bonds, or railway debentures, being payable to bearer, are negotiable (*a*), and the holder may sue on them for the interest, independently of and separately from the bonds (*b*). Being securities for money, they may be taken under a writ of execution, or attached in the hands of a third person. Colonial and foreign bonds or debentures, issued since the 3rd of June, 1862, for money raised or borrowed in this country upon their security, are subject to a stamp duty of one-eighth per cent. upon the principal amount for which the bonds are respectively given (*c*). Foreign or colonial bonds issued in this country, prior to this period, did not require to be stamped (*d*). Coupons are, however, free from stamp duty. The holders of consols are enabled to convert their stock into certificates of a like amount, with coupons annexed, representing the annual dividends (*e*).

(*a*) *Gorgier v. Mievill*, 3 B. & C. 45; *Price v. Great Western Railway Company*, 16 L. J., Exch. 87.

(*b*) *Beaver v. Armstrong*, 10 Upper Canada Law Journal, 21.

(*c*) 25 Vict. c. 22, s. 1, Sched. (C.)

(*d*) *Yrisari v. Clement*, 2 Car. & P. 223.

(*e*) See *ante*, 369.

CHAPTER XXV.

REMITTANCES.

As regards questions respecting the transmission of money, by the intervention of bankers, from one part of England to another, many points have been noticed, arising in cases which have been referred to principally for other purposes, and will be found in parts of the work where discounts, commission, and the relations between banks in one town, and their branches, or correspondents in London, or elsewhere, are stated.

A. & Co., in America, remitted to B. & Co., in Liverpool, bills of exchange, for the purpose of taking up other bills of nearly the same amount which were maturing and payable at Liverpool. A. was a partner with B. at Liverpool, but in a totally different partnership. B. had deposited these bills with a Liverpool bank, to meet advances which the bank had made for the firm of B. & Co., and he did not appropriate the proceeds as directed by A. & Co.: it was held, that the holders of the bills, to take up which the second set had been transmitted to England, were entitled to recover as against the bank the amount of the proceeds of such bills, the bank having had notice of such intended appropriation (*a*).

Where a debtor remits to his creditor a bank note or a bill of exchange, by a mode of conveyance directed by the creditor; or, if he transmits by the post, as being the usual mode of transmission, in the absence of orders from the creditor prescribing the mode, and the bill or note is lost or stolen, the loss falls upon the creditor (*b*).

(*a*) *Thayer v. Lister*, 30 L. J., Chanc. 427.

(*b*) *Warwick v. Noakes*, Peake, 67.

Foreign.—With respect to the transmission of money, between England and foreign countries, it may be desirable to notice some of the decisions, especially as regards the subject of the course of exchange.

A., in London, drew a bill on B., in Paris, which, having been negotiated through Amsterdam, was presented for acceptance to B., who refused to accept it, but promised that the bill should be paid at maturity. Before, however, the bill was due, the French Government prohibited the payment of any bills drawn in countries at war with France, which Great Britain was at that time, and on that account the bill was not paid by B. Under these circumstances A. was held liable to the payees, not merely for the whole value, that he originally had received for the bill, with interest, and the expenses of protesting, but for the amount of the re-exchange, by the circuitous course of Amsterdam, that being a consequence of the bill not having been paid (*d*).

When a bill drawn and indorsed in England, and payable abroad, is dishonoured by the acceptor's nonpayment, the holder is entitled as against the drawee to the amount of the re-exchange, that is, the value of the rate of exchange on the day of the dishonour, of the sum expressed on the face of the bill in the currency of the country where it is payable, with interest and expenses (*e*).

So, a drawer, in Louisiana, of bills upon acceptors in London upon their insolvency is entitled to prove, not only for the amount of the bills, but also for 10*l.* per cent. upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills, on their return dishonoured and protested for nonpayment in Louisiana (*f*).

(*d*) *Mellish v. Simeon*, 2 H. Bl. 378; and see *De Tastet v. Baring*, 11 East, 265.

(*e*) *Suse v. Pompe*, 8 C. B., N. S. 538; 30 L. J., C. P. 75.

(*f*) *Walker v. Hamilton*, 1 De G., F. & J. 602.

CHAPTER XXVI.

JOINT STOCK BANKS.

It now becomes necessary to state in what respects the legislature has interfered, to qualify or regulate the general law with respect to bankers, in cases where a number of persons combine or unite for the purpose of carrying on a banking establishment.

By the 39 & 40 Geo. III. c. 28, s. 15, it was forbidden to establish any corporate bank whatever, or any bank where the number of bankers in partnership should exceed six, so as "to borrow, owe, or take up any sum or sums of money, on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof," during the continuance of the privileges secured to the Bank of England, by former acts of parliament.

Copartnerships under 7 Geo. IV. c. 46.—In 1826, the 7 Geo. IV. c. 46, was passed, legalizing the formation under deeds of settlement of banking copartnerships consisting of more than six persons, provided they did not carry on business within the distance of sixty-five miles from London, and had not any of their establishments in London. Every member was also responsible for the payment of all bills and notes issued, and for all sums of money borrowed, owed or taken up, by the copartnership. The first section imposing these restrictions and conditions enacts:—

That after the 26th of May, 1826, it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united, or carrying on business together, shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may law-

fully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five miles from London, payable on demand or otherwise, at some place or places specified upon such bills or notes exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid :

Provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London ; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed and taken up by the corporation or copartnership, of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership, any agreement, covenant or contract to the contrary notwithstanding.

Drawing Bills or Notes.—The second section also restrained these copartnerships from drawing upon any partner or agent, or other person resident in London, or elsewhere within the prescribed distance, any bill of exchange payable on demand, or being for a less amount than 50*l*.

Bills of exchange for 50*l*. and upwards, payable either in London or elsewhere, at any period after date, or after sight, were excepted.

In 1833, the above prohibition was, however, removed, to the extent of allowing these copartnerships to make their bills and notes payable in London by an agent, or to draw bills and notes upon such agent, payable on demand or otherwise, in London, and for any amount less than 50*l*.(a).

(a) 3 & 4 Will. 4, c. 83, s. 2.

Borrowing, owing, and taking up Money on Bills or Notes.—These copartnerships could not borrow, owe or take up in London, or elsewhere within sixty-five miles from London, any sum or sums of money, on their own bills or notes, payable on demand or at any less period than six months from the borrowing thereof(*b*). They might, however, discount in London or elsewhere bills not drawn by or upon themselves, or by or upon any person on their own behalf(*b*).

Doubts having arisen as to the construction of the 39 & 40 Geo. III. c. 28, mentioned above, and of 7 Geo. IV. c. 46, as to the extent of the exclusive privileges of the Bank of England, it was enacted that (*c*):—

Any body politic or corporate, or society or company or partnership, although consisting of more than six partners, may carry on the trade or business of banking *in London, or within sixty-five miles thereof*, provided that such body politic or society, or company or partnership, do not borrow, owe or take up in England, any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the privileges granted by *this act* (viz., 3 & 4 Will. IV. c. 98), to the Bank of England.

The acceptance by one of these copartnerships of a customer's bill, at less than six months' date, on account of a balance in favour of the customer, was held to be a *borrowing* in point of law, within the meaning of this statute(*d*).

The drawing of a bill, at a longer period than six months, though the acceptance was within six months of its maturity, was a violation of the provisions of the statute, and all persons, who were privy to it, could not enforce the acceptance; though such violation did not affect a *bonâ fide* holder without notice(*d*).

So, where a London joint stock bank, consisting of more than six persons agreed with a Canadian bank that

(*b*) 7 Geo. 4, c. 46, s. 3.

(*c*) 3 & 4 Will. 4, c. 98, s. 3.

(*d*) *Bank of England v. Anderson*, 3 Bing. N. C. 589.

the manager of the London bank should accept bills drawn by the Canadian bank, payable at a date earlier than six months, and the London bank should provide funds for meeting them : it was held, that the acceptance of such bills was unlawful, and an infringement of the privileges of the Bank of England (*e*).

A firm of more than six persons, not in partnership for banking purposes, might accept such bills (*f*).

Subsequently, by the Bank Charter Act of 1844, as we have seen, these restrictions were removed, and by sect. 26, banking companies, although exceeding six persons in number, either in London, or within sixty-five miles of it, might draw, accept or indorse bills of exchange not being payable to bearer on demand.

Issuing and Re-issuing Notes.—These banking copartnerships exceeding six in number were prohibited from issuing or re-issuing in London, or at any place or places within sixty-five miles from London, bank post bills or bills or notes payable to bearer on demand (*g*). By 3 & 4 Will. IV. c. 98, s. 3, they might issue bills or notes payable on demand or otherwise at the place at which the same were issued, being more than sixty-five miles from London, and have agents in London for the payment only of such bills ; but such bills or notes could not be for a sum less than 5*l.*, or be re-issued in London or within sixty-five miles thereof. Since the 19th of July, 1844, the right to issue bank notes has been limited to bankers, including these copartnerships, who did so on the 6th of May, 1844, as already pointed out in treating of banks of issue.

Return or Account of Names of Members and Public Officers.—The next enactment, in the 7 Geo. IV. c. 46, is

(*e*) *Booth v. Bank of England*, 6 Bing. N. C. 415.

(*f*) *Perring v. Dunston*, R. & M. 426.

(*g*) 7 Geo. 4, c. 46, s. 2.

sect. 4, with respect to the returns these copartnerships are bound to make:—

Before any such corporation or copartnership, exceeding the number of six persons in England, shall begin to issue any bills or notes, or borrow, owe or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A.), wherein shall be set forth the true names, title or firm of such intended or existing corporation or copartnership, and also the names or places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as hereinafter provided (*h*), and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents, and every such amount or return shall be delivered to the Commissioners of Stamps, at the Stamp Office in London, who shall cause the same to be filed and kept in the Stamp Office, and an entry and registry thereof to be made in a book or books, to be there kept for that purpose, by some person or persons to be appointed by the commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect, on payment of one shilling for every search.

The form above referred to is as follows:—

Return or account to be entered at the Stamp Office in London, in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled [*insert the title of act*], viz.

Firm or name of the banking corporation or copartnership, viz. [*set forth the firm or name*].

Names and places of abode of all the partners concerned or engaged in such corporation or copartnership, viz. [*set forth all the names and places of abode*].

Names and places of the bank or banks established by such corporation or copartnership, viz. [*set forth all the names and places*].

Names and descriptions of the public officers of the said banking

(*h*) *i. e.* by a public officer. See *post*, Chapter “Public Officer.”

corporation or copartnership, viz. [*set forth all the names and descriptions*].

Names of the several towns and places where the bills or notes of the said banking corporation or copartnership, are to be issued by the said corporation or copartnership, or their agent or agents, viz. [*set forth the names of all the towns and places*].

A. B. of _____, secretary [*or other officer, describing the office (i)*], of the above corporation or copartnership, maketh oath and saith, that the above doth contain the name, style and firm of the above corporation or copartnership, and the names and places of the abode of the several members thereof, and of the banks established by the said corporation or copartnership, and the names, titles and descriptions of the public officers of the said corporation or copartnership, and the names of the towns and places where the notes of the said corporation or copartnership are to be issued, as the same respectively appear in the books of the said corporation or copartnership, and to the best of the information, knowledge and belief of this deponent.

Sworn before me the _____ day of _____, at _____, in the county of _____.

C. D., justice of the peace in and for the said county.

A return or an account, omitting the words *justice of the peace*, is receivable in evidence, it being proved that the person signing the verification was, in fact, a justice of the peace (*k*).

This section has become immaterial in one respect, viz., as regards that part of it which makes compliance with it a condition precedent to the power of issuing notes, because, since the 19th of July, 1844, by the 7 & 8 Vict. c. 32, s. 10, no new bank can issue notes; but it is necessary to retain it in other respects, because, as to them, it is still law.

A certified copy of the return is evidence of the facts pertinently stated in it; it is not necessary to prove that the affidavit verifying it was made by the public registered officer of the company (*l*).

(*i*) "Public officer" is sufficient, at least without proof that he held a specific office. *Armitage v. Hamer*, 3 B. & Ad. 793.

(*k*) *Bosanquet v. Woodford*, 5 Q. B. 310.

(*l*) *Bosanquet v. Woodford*, 5 Q. B. 310. If it purports to be signed by the "cashier" it will suffice. *Harvey v. Scott*, 11 Q. B. 92, 102.

On the other hand, the return is not the only evidence of these facts, for they may be proved *aliunde* (m). An annual general return for March, 1848, has been held admissible in evidence, to show a person to be a member on the 24th of January, 1848 (n).

By sect. 4, the return is made evidence, that all persons named therein, as members of the corporation or copartnership, were such at the date of the account or return. On the other hand, however, when certain proprietors of a company were sued upon a judgment against the public officer, the enumeration of proprietors in such a return, to the Inland Revenue Office, was not receivable in evidence against the plaintiff, to show that at the time they were not proprietors (o).

It is said to be the rule not to admit the return in evidence, unless it has been filed within the time limited by the statute (p).

The fact of the return having been made, is not a condition precedent to the public officer's right to sue on behalf of the company (q).

Annual Return.—The continuance of the returns is thus provided for by sect. 5:—

That such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace, and which oath any justice of the peace is hereby authorized and empowered to administer, and that such account or return shall, *between the 28th of February and the 25th of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid, to the Commissioners of*

(m) *Edwards v. Buchanan*, 3 B. & Ad. 788; *Rex v. James*, 7 Car. & P. 553; *Reg. v. Carter*, 1 Den. C. C. 65.

(n) *Bosanquet v. Shortridge*, 4 Exch. 699.

(o) *Prescott v. Buffery*, 1 C. B. 41.

(p) 2 Taylor on Evidence, 1491, 4th edit.

(q) *Bonar v. Mitchell*, 5 Exch. 415; 19 L. J., Exch. 302, decided on similar provisions in the Scotch Banking Act, 7 Geo. 4, c. 67.

Stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned.

This is one of the provisions of the legislature, which it is usual to call *directory*; it does not seem to be obligatory to file the return within the specified period of the year (*r*).

Then sect. 6 enacts, that certified copies of such returns shall be evidence (*s*).

It is manifest, that register books, in which the names of members are inscribed, from which the returns are to be copied, cannot be altered or varied by the directors, or the company, especially not *post litem motam*, except for the purpose of a merely verbal correction (*t*).

The Board of Inland Revenue is directed, for a fee of ten shillings, to give certified copies of the returns or accounts, by sect. 7.

An account of the names of persons appointed officers, persons ceasing to be members, of persons newly becoming members, &c., is to be made *from time to time*, as occasion requires, by sect. 8:—

That the secretary or other officer of every such corporation or copartnership shall, and he is hereby required from time to time, as often as occasion shall render it necessary, make out upon oath, in manner hereinbefore directed, and cause to be delivered to the Commissioners of Stamps, a further account or return, according to the form contained in the schedule marked (B.), of the name or names of any person or persons who shall have been nominated or appointed a new or additional public officer or public officers of such corporation or copartnership, and also of the name or names of any person or persons who shall have ceased to be members of such corporation or copartnership, and also of the name or names of any person or persons who shall have become a member or members of such corporation or copartnership, either in addition to or in the place or stead of any former member or members thereof, and of the name or names of any new or additional town or towns, place or places, where such bills or notes are or are intended to be issued, and where the same are to be

(*r*) *Per Parke, B., Steward v. Dunn*, 12 M. & W. 663.

(*s*) See as to the form and requisites of the return, *Bosanquet v. Shortridge*, 19 L. J., Exch. 221.

(*t*) *Shortridge v. Bosanquet*, 16 Beav. 96.

made payable; and such further accounts or returns shall from time to time be filed and kept, and entered and registered at the Stamp Office in London, in like manner as is hereinbefore required with respect to the original or annual account or return hereinbefore directed to be made.

The form in the schedule is as follows:—

Return or account to be entered at the Stamp Office in London, on behalf of [*name the corporation or copartnership*], in pursuance of an act passed in the seventh year of the reign of King George the Fourth, intituled [*insert the title of act*], as relates to the same.

Names of any and every new or additional public officer of the said corporation or copartnership, viz.

A. B. in the room of C. D., deceased, or removed, [*as the case may be; set forth every name*].

Names of any and every person who may have ceased to be a member of such corporation or copartnership, viz. [*set forth every name*].

Names of any and every person who may have become a new member of such corporation or copartnership [*set forth every name*].

Names of any additional towns or places where bills or notes are to be issued, and where the same are to be made payable.

A. B. of , secretary [*or other officer*] of the above-named corporation or copartnership, maketh oath and saith, that the above doth contain the name and place of abode of any and every person who hath become or been appointed a public officer of the above corporation or copartnership, and also the name and place of abode of any and every person who hath ceased to be a member of the said corporation or copartnership, and of any and every person who hath become a member of the said copartnership since the registry of the said corporation or copartnership, on the day of last, as the same respectively appear on the books of the said corporation or copartnership, and to the best of the information, knowledge and belief of this deponent.

Sworn before me day of , at , in the county of .

C. D., justice of the peace in and for
the said county.

These returns are also required to be made by banking companies carrying on business within sixty-five miles of London (*u*).

By 7 & 8 Vict. c. 32, s. 21, all bankers in England and

(*u*) 25 & 26 Vict. c. 89, s. 205, 3rd Schedule, Part II.

Wales must on the 1st of January in each year, or within fifteen days afterwards, make a return to the Commissioners of Inland Revenue of his name, residence and occupation, and, in case of a company or copartnership, of the name, residence and occupation of every member, with other particulars.

Actions and Suits.—No more than one action or suit for the recovery of one and the same demand can be brought against these copartnerships, in case the merits have been tried in such action or suit (*x*).

The mode prescribed by 7 Geo. IV. c. 46, s. 9, for these copartnerships to sue and be sued, is by a public officer, and being applicable to other banking companies by subsequent legislation, it will be more useful to consider the whole subject under one title (*y*).

Set-off between Copartnership and Members.—With respect to this right it is enacted (*z*),—

That no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits or *bonus*, payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits or *bonus*, payable or apportionable in respect thereof.

Where a member of a banking copartnership kept an account with them as his bankers, and became bankrupt, indebted to the bank on the account, the company, being largely indebted to other persons, has a right of

(*x*) 7 Geo. 4, c. 46, s. 10, and 1 & 2 Vict. c. 96, s. 2, made perpetual by 5 & 6 Vict. c. 85.

(*y*) See *post*, Chapter "Public Officer."

(*z*) 1 & 2 Vict. c. 96, s. 4, continued by 3 & 4 Vict. c. 111, and afterwards made perpetual by 5 & 6 Vict. c. 85.

proof against the bankrupt in respect of the balance due to them on his account (*a*).

Effect of Judgments, Decrees and Orders.—Then there is a provision, that decrees in equity, made or obtained against the public officer, shall take effect against the company (*b*), and so with respect to judgments in actions (*b*).

The 7 Geo. IV. c. 46, s. 13, provided a mode of realizing the fruits of a judgment obtained against the public officer, in case there were no partnership assets to meet it, by an exhaustive process of execution against members, either collectively or individually. This process was by issuing a writ of scire facias, by leave of the Court, in order to make them parties to the judgment, and so liable to execution (*c*).

This mode of proceeding against members, when execution against the public officer proves to be fruitless or ineffectual, would seem to have been entirely superseded by the power given to a company, unable to meet its liabilities, or to creditors whose claims are unsatisfied, of obtaining a winding-up order under the Companies Act of 1862, and thus to stay all legal proceedings against the company or its members (*d*). The procedure by scire facias is therefore practically obsolete. It may be observed, that when execution issued upon a judgment against the public officer, no scire facias was necessary, as he was a party to the judgment and previously liable thereon (*e*). Execution could not issue against parties after they had ceased to be members for three years (*f*). But members satisfying an execution against them were entitled to reimbursement out of the funds of the copartnership, or to contribution from the other members, as in the case of

(*a*) *Ex parte Davidson*, 2 M., D. & De G. 368.

(*b*) 7 Geo. 4, c. 46, ss. 11 and 12.

(*c*) *Ransford v. Bosanquet*, 2 Q. B. 972; *Dodgson v. Scott*, 2 Exch. 469; *Bank of England v. Johnson*, 3 Exch. 598.

(*d*) 25 & 26 Vict. c. 89, ss. 199, 201, and ss. 80, 87, 89.

(*e*) *Harwood v. Law*, 7 M. & W. 203.

(*f*) *Barker v. Buttress*, 7 Beav. 134.

an ordinary partnership (*g*). The law applicable to the winding-up of banking companies, and the liability of shareholders to contribution, will form the subject of separate consideration.

Registering Judgments against Members.—If a judgment is recovered against the public officer, and it is sought to charge the real estate of a member of the copartnership at the date of the judgment, the Court of Common Pleas has no jurisdiction over the senior master, to order him to receive the memorandum, in order to register the judgment, pursuant to the 1 & 2 Vict. c. 110, s. 19, and 3 & 4 Vict. c. 82, s. 2. It is entirely in his discretion to receive the memorandum (*h*).

Where, however, a creditor obtained a judgment against the official manager of a banking company, and registered the judgment against the real estate of a former shareholder without the leave of the Court, the Irish Court of Chancery gave relief against such registration and ordered it to be removed, as being a cloud on his title to his lands (*i*). The registration of judgments or decrees in equity, in order to charge the lands of shareholders, will now be rarely resorted to, as the means of obtaining satisfaction of judgment debts will be more efficacious under proceedings to wind-up the company.

The 7 Geo. IV. c. 46, unrepealed.—Such are the several provisions relating to the constitution and regulation of these copartnerships; and they are still in force as to all such copartnerships which have not registered themselves under the Joint Stock Banking Companies Act of 1857 (*k*), or under the Companies Act of 1862 (*l*), or have not obtained letters patent incorporating them under the 7 & 8 Vict. c. 113.

(*g*) 7 Geo. 4, c. 46, s. 14.

(*h*) *Ex parte Ness*, 5 D. & L. 339; 5 C. B. 155; 2 & 3 Vict. c. 11, s. 8.

(*i*) *Hone v. O'Flahertie*, 9 Ir. Chanc. Rep. 119, 497; see *Harris v. Royal British Bank*, 27 L. J., Exch. 1.

(*k*) 20 & 21 Vict. c. 49.

(*l*) 25 & 26 Vict. c. 89. The 6 Geo. 4, c. 42, as to Irish banks, is still in force.

Joint Stock Banks under the 7 & 8 Vict. c. 113.—Copartnerships could not be formed by deeds of settlement, under the 7 Geo. IV. c. 46, after the 6th of May, 1844. The 7 & 8 Vict. c. 113, for regulating joint stock banks in England (*m*), which was passed in the year 1844, prohibited the formation of banking companies consisting of more than six persons, unless by virtue of letters patent granted according to its provisions. It enabled banking companies of more than six persons, either formed or carrying on business before the 6th of May, 1844, to obtain letters patent incorporating them (*n*). That act was subsequently repealed as we shall afterwards see, but it is necessary to refer to the provisions of the act as governing the companies formed under it.

A body of persons intending to become a joint stock banking company under this act petitioned the Queen in council, according to a prescribed form (*o*); and, on the report of the Board of Trade, that the statutory requirements had been complied with, a charter was to be granted (*p*); a deed of settlement was to be executed, containing certain specified provisions (*q*), which, however, have been materially altered in one respect by subsequent legislation, to be mentioned hereafter, so as to admit of the re-election of outgoing directors (*r*), and the deed must have been executed by the holders of at least one-half of the shares (*q*), and the Queen might by the letters patent incorporate the company (*s*); but so that the liability of the shareholders was not to be limited (*t*), and actions might be brought by or against the company, or share-

(*m*) The 9 & 10 Vict. c. 75, was a similar enactment for the regulation of joint stock banks in Ireland and Scotland.

(*n*) 7 & 8 Vict. c. 113, s. 45.

(*o*) *Id.*, s. 2.

(*p*) *Id.*, s. 3.

(*q*) *Id.*, s. 4.

(*r*) See *infra*, p. 458.

(*s*) 7 & 8 Vict. c. 113, s. 6.

(*t*) *Id.*, s. 7.

holders, reciprocally (*u*), every judgment, decree or order of any court of justice against the company being enforceable against the company, and against shareholders and former shareholders (*x*), and execution, against the company proving ineffectual, might be had against any shareholder; and if that was unproductive, then against any person who was a shareholder at the time when the cause of action arose, with a limitation of three years after ceasing to be a shareholder (*y*); such shareholder being entitled to reimbursement out of the effects of the company, or, in default, to contributions from the other shareholders (*z*).

A creditor obtaining a judgment against the company, was at liberty to proceed by scire facias on the judgment against the shareholders, and was not limited to the remedy given by execution (*a*).

Incorporation of Company.—The letters patent incorporated the body for the purposes of banking, and empowered them to purchase and hold lands of such annual value as was expressed in the letters patent; but these were to be granted for a term of years, not exceeding twenty years (*b*); and the incorporation was not to limit the liability of the shareholders, as before observed.

Returns.—Within three months after the grant of the letters patent, and before the company began business, a memorial was to be made out (*c*), setting forth the title or firm of the company, the names and places of abode of all the members, and of the directors, managers and other like officers, and the names and places of every bank or banks established by the company, and the name of every town

(*u*) 7 & 8 Vict. c. 113, s. 8.

(*x*) *Id.*, s. 9.

(*y*) *Id.*, s. 10.

(*z*) *Id.*, ss. 11, 12, 13, 14, 15.

(*a*) *Cleve v. Harwar*, 1 H. & N. 873.

(*b*) 7 & 8 Vict. c. 113, s. 6.

(*c*) *Id.*, Sched. A.

or place where the business was to be carried on,—this was to be repeated every year between the 28th of February and the 25th of March, as long as they carried on business as bankers,—to be delivered to the Inland Revenue Office, there to be filed, and an entry or a register made in a book, to be open to search for a fee of one shilling; and a printed list of the registered names and places of abode was to be made out from time to time and kept in a conspicuous place, in the company's principal place of business (*c*); a like memorial was to be made out from time to time, as occasion required, and delivered to the above office, according to a prescribed form (*d*), containing the above particulars of every new director, manager or other like officer, and the names of all persons who had become members, either in addition to or instead of any former member, and the name of every new town in which the company carried on business, and the names of all who had ceased to be members; and such further account was to be filed and registered at the stamp office (*e*); these memorials were to be signed by the manager, or one of the directors, and verified by his declaration before a magistrate (*f*), and the persons whose names appeared in the then last-delivered memorial were to be from time to time the existing shareholders (*g*).

Certified copies of these memorials, under the hand of the commissioners of stamps and taxes, were receivable in evidence as proof of their contents (*h*); and were obtainable on the payment of a fee of ten shillings (*i*).

A shareholder, whose name was properly inserted in the last-delivered memorial, remained liable to execution, although he had subsequently bonâ fide transferred his shares, and the transfer had been duly executed by the

(*c*) 7 & 8 Vict. c. 113, s. 16.

(*d*) *Id.*, Sched. B.

(*e*) *Id.*, s. 17.

(*f*) *Id.*, s. 18.

(*g*) *Id.*, s. 21.

(*h*) *Id.*, s. 19.

(*i*) *Id.*, s. 20.

transferee and registered (*k*). But if a shareholder died before a judgment was obtained against the company, although his name appeared in the memorial, which was existing at the time of his death, his executors could not be proceeded against by a judgment creditor (*l*).

The Courts would not interfere with the company in the performance of the duty of making these returns, as regarded the form in which they were made.

A., being a shareholder in a joint stock bank, executed a deed of transfer of his shares to his sister, and received from the company certificates of the shares in her name. Previously to the execution of the transfer, and in consequence of communications with A., the company had, in their returns under the 7 & 8 Vict. c. 113, omitted A.'s name, and returned that of his sister as a new member of the company. The company stopped payment; and a call was made of 5*l.* per share, which the sister declared her inability to pay. After this the company returned A.'s name to the Inland Revenue as the shareholder, and subsequently informed his sister that the company could not recognize the transfer to her.

On these facts a Court of Equity refused to restrain the company from returning A.'s name as a member (*m*).

Capital.—The capital stock of the company was in no case to be less than 100,000*l.*; the means by which it was to be raised, the amount paid up at the date of the petition to the Queen for the grant of letters patent, and where and how such paid-up capital was at that date invested, must all have been set out in such petition (*n*). Before a company commenced business, one-half at least of the capital subscribed for was required to be fully paid up (*n*). But the omission to comply with this provision did not

(*k*) *Fry v. Russell*, 3 C. B., N. S. 665; 27 L. J., C. P. 153.

(*l*) *Powis v. Butler*, 4 C. B., N. S. 469; 27 L. J., C. P. 249.

(*m*) *Bullock v. Chapman*, 2 De G. & S. 211.

(*n*) 7 & 8 Vict. c. 113, ss. 2 and 5.

render the company illegal or relieve the shareholders from the payment of its debts or liabilities (*o*).

Shares.—In the petition to the Queen for the grant of letters patent, the persons proposing to become a banking company must have set out the proposed number of shares; the shares were not to be less than 100*l.* each; the actual amount of each of the shares into which the proposed capital stock was to be divided must also have been stated (*p*).

The deed of partnership must have contained also specific provisions for preventing the company from purchasing any shares, or making advances of money or securities for money, to any person, on the security of a share or shares in the partnership business (*q*).

Transfer of Shares.—Subject to the regulations of the act, and to the provisions of the deed of settlement, every shareholder might sell and transfer his shares by deed duly stamped, in which the consideration was to be truly stated, such deed to be according to a given form (*r*), or to the like effect; such deed, after execution, to be delivered to the secretary of the company, to be kept by him, and a memorial thereof entered by him in the register of transfers; the entry was to be indorsed on the deed, at a fee for every such entry and indorsement, of not exceeding 2*s.* 6*d.*, payable to the company.

Until such transfer was delivered to the secretary, the buyer was not entitled to dividends, or to vote, in respect of such share (*s*).

No share could be transferred until all calls, for the

(*o*) *In re London and Eastern Banking Corporation, Ex parte Longworth*, 1 De G., F. & J. 17; 29 L. J., Chanc. 55.

(*p*) 7 & 8 Vict. c. 113, s. 2.

(*q*) *Id.*, s. 4.

(*r*) *Id.*, Sched. C.

(*s*) *Id.*, s. 23.

time being due on it, and every other share the owner of it held was paid (*u*).

The register of transfers was to be closed by the directors for not more than fourteen days previously to each ordinary meeting; they might fix a day for the closing, of which seven days' notice was to be given in the London Gazette (*x*): any transfer made within such fourteen days was to be considered as being made subsequently to such ordinary meeting, as between the company and the transferee (*y*).

When shares came to any one by the death, bankruptcy or insolvency of a shareholder, or by the marriage of a female shareholder, or by other legal means than by the above mode of transfer, the claimant was not entitled to receive dividends, or vote in respect of them, until such transmission of them was authenticated by a declaration in writing, stating the manner, how, and to whom they passed, to be made and signed by some credible person before a magistrate (*z*).

This declaration was to be left with the secretary, who thereupon was to enter the name of the person entitled on the register book of shareholders, at a fee of not exceeding 2s. 6d., payable to the company (*a*).

Where persons are jointly entitled to shares, all notices required to be given to shareholders must be given to the person whose name stands first in the register of shareholders, which was to be notice to all of them (*b*).

When the shareholder is a minor, idiot or lunatic, the receipt for any money payable to him, of the guardian, in

(*u*) 7 & 8 Vict. c. 113, s. 24.

(*x*) In s. 25, the words used are, "notice shall be given by advertisement in some newspaper as after mentioned," but the only newspaper mentioned subsequently is the London Gazette, s. 38.

(*y*) 7 & 8 Vict. c. 113, s. 25.

(*z*) *Id.*, s. 26. The directors might require such other form as they might think fit.

(*a*) *Id.*, s. 26. The transmission of shares by will, intestacy or on marriage of a female shareholder, is provided for by s. 27.

(*b*) *Id.*, s. 28.

case of a minor, of the committee, in case of an idiot or lunatic, shall be sufficient (*c*).

The company was not bound to regard trusts to which any shares might be subject (*d*).

The receipt of the person in whose name a share stands in the books of the company discharged the company, in respect of any dividend or other sum payable in respect of such share, notwithstanding any trust attaching to the share (*d*).

The liability of shareholders was unlimited (*e*); they might be sued by, and sue the company (*f*), and judgment, decrees and orders, against the company, might be under certain circumstances enforced against them individually, whether they were members at the time the cause of action arose, or had been members within three years (*f*).

A creditor could not maintain an action against a shareholder for his debt, his remedy was against the company (*g*).

Calls.—From time to time the directors might make such calls on the shareholders, “in respect of the amount of capital stock respectively subscribed by them,” as the directors shall think fit (*h*).

Whenever execution upon any judgment against the company shall have been taken out against any shareholder, the directors, within twenty-one days next after notice served upon the company, of the payment of any money by such shareholder, his executors or administrators, in or toward satisfaction of such judgment, shall make such calls upon all the shareholders as will be sufficient to reimburse such shareholder, his executors or administrators, and every shareholder must pay every call to the

(*c*) 7 & 8 Vict. c. 113, s. 29.

(*d*) *Id.*, s. 30.

(*e*) *Id.*, s. 7.

(*f*) *Id.*, ss. 8, 9, 10.

(*g*) *Fell v. Burchett*, 7 El. & Bl. 537; 26 L. J., Q. B. 223.

(*h*) 7 & 8 Vict. c. 113, s. 31.

persons at the times and places from time to time appointed by the directors (*i*).

Besides being liable to pay calls, shareholders might forfeit their shares by leaving calls unpaid, if the directors at any time after six calendar months from the day appointed for the payment of such calls declared them to be so forfeited; the shareholders still remaining liable for the calls due before the forfeiture (*k*).

But in order to authorize the sale or forfeiture of such shares, the declaration must be confirmed at some general meeting, held at least two calendar months from the day the notice of intention to declare was given (*l*).

And on payment of the arrears of calls due on such shares and the interest and expenses being made before actual sale, they reverted to the original owner (*m*).

Directors.—The deed of partnership of every joint stock banking company under this statute, which was to be prepared according to a form, to be approved of by the Board of Trade, in addition to any other provisions, which might be contained in it, must have included specific provisions for the management of the affairs of the bank, and the election and qualification of directors (*n*).

As regards re-election of retiring directors, no deed of settlement of any company, established since the 29th of July, 1856, under the 7 & 8 Vict. c. 113, need have contained any proviso for *preventing* the re-election of retiring directors, either absolutely or for any limited period; and, in every banking company, being at that date established

(*i*) 7 & 8 Vict. c. 113, s. 31. Interest at 5*l.* per cent. per annum on calls unpaid was recoverable, s. 32. And sects. 33, 34 and 35 provided for the enforcement and proof of calls in an action.

(*k*) *Id.*, s. 37. Notice of the intention to declare must have been first served, s. 38; if the address of the proprietor was not known, it must be published in London Gazette, s. 38.

(*l*) *Id.*, s. 39. Evidence of forfeiture, s. 40. Title to such shares of buyer, s. 40. By s. 41, no more shares to be sold than sufficient to satisfy calls and costs.

(*m*) *Id.*, s. 42.

(*n*) *Id.*, s. 4.

under that act, the directors retiring at any general meeting henceforth will be eligible for re-election, (if duly qualified in other respects,) notwithstanding the proviso in the 4th section, that the deed of partnership should contain a specific proviso for the retirement of at least one-fourth of the directors yearly, and for preventing the re-election of the retiring directors, for at least twelve calendar months: this proviso having been repealed by the 19 & 20 Vict. c. 100, ss. 1, 2.

Any one of the directors was empowered to sign bills of exchange or promissory notes on behalf of the company, provided it was therein expressed to be made, accepted or indorsed by him on behalf of the company; and he was not to be liable on such bills or notes, otherwise than he would have been on any other contract, signed by him on behalf of the company (*o*).

Manager.—A manager, or other officer to perform the duties of a manager, must have been appointed under this statute (*p*).

The duties of the manager, who was not personally liable on contracts signed by him on behalf of the company, were the following only, as limited by the statute.

Bills of exchange or promissory notes on behalf of the company might be made, accepted or indorsed, in any manner specified in the deed of partnership, provided they were signed by the manager (or one of the directors), and by him expressed to be so on behalf of the company (*q*).

Service of Proceedings.—Services of notices, writs or other proceedings at law or in equity, or otherwise, on the manager or any director, by leaving them at the principal office of the company, or if the company had suspended or

(*o*) 7 & 8 Vict. c. 113, s. 22.

(*p*) *Id.*, s. 4.

(*q*) *Id.*, s. 22.

discontinued business, by serving personally the manager or director, or by leaving the same with some inmate at the usual or last abode of the manager, was good service on the company (*r*).

Meetings.—There must be holden once at least every year, at an appointed time and place, an ordinary general meeting of the company (*s*).

Extraordinary general meetings must be held upon the requisition of nine shareholders or more, having, in the whole, at least twenty-one shares (*s*).

Audit.—The deed of partnership must contain provisions for the yearly audit of the accounts by two or more auditors chosen at a general meeting of the shareholders, and not being directors (*s*).

Publication of Accounts, &c.—The deed of partnership must contain provisions for the publication once at least in every month of the assets and liabilities of the company, and for the yearly communication to every shareholder of the auditor's report, of a balance sheet, and profit and loss account (*s*).

These were the several regulations prescribed by the Act of 1844.

Joint Stock Banks within Sixty-five Miles of London.—The 3 & 4 Will. IV. c. 98, s. 3, as already shown (*t*), enabled banking companies of more than six members to carry on business within sixty-five miles from London, but they were not empowered by any Act of Parliament to sue or be sued by a public officer. The 7 & 8 Vict. c. 113, therefore, conferred upon these companies, which were established on the 6th of May, 1844, the powers and

(*r*) 7 & 8 Vict. c. 113, s. 43.

(*s*) *Id.*, s. 4.

(*t*) *Ante*, 441.

privileges of suing and being sued in the name of a public officer, and enacted that judgments, decrees and orders might be enforced, as under the 7 Geo. IV. c. 46, with respect to banking companies carrying on business beyond sixty-five miles from London, provided they made out and delivered the several accounts required by that act (*u*). The act, however, was repealed in 1857 (*x*), but the last-mentioned provisions as to banking companies within sixty-five miles of London, suing and being sued, and making the returns, were re-enacted in 1862 (*y*).

Registration of Banking Companies.—In 1857, the companies formed under the 7 & 8 Vict. c. 113, were required to be registered under the Joint Stock Banking Companies Act of that year (*z*); and legal proceedings commenced by or against a company when registered, or public officer, might be continued as if registration had not taken place, but execution was not to be issued against the effects of individual shareholders or members upon any judgment, decree or order obtained against the company (*a*), for, in the event of the property and effects of the company being insufficient to satisfy such judgment, order or decree, an order might be obtained for winding-up the company (*b*).

The procedure prescribed by the 7 & 8 Vict. c. 113, s. 9, for obtaining execution against individual members was practically abolished, and the right of contribution from all the shareholders by proceedings against the company was established and enforceable.

If these companies neglected to register before the 1st of January, 1858, they were incapacitated from suing either at law or in equity, though they might be sued, nor could

(*u*) 7 & 8 Vict. c. 113, s. 47.

(*x*) 20 & 21 Vict. c. 49, s. 12.

(*y*) 25 & 26 Vict. c. 89, s. 205, Third Schedule, Part 2.

(*z*) 20 & 21 Vict. c. 49.

(*a*) *Id.*, s. 10.

(*b*) *Id.*, c. 49.

any dividend be payable to their shareholders, and the directors or managers incurred a penalty of 5*l.* for every day the registration was delayed (*c*). The omission to register did not however render the company illegal (*c*). The act also enabled banking companies, which were not formed under the 7 & 8 Vict. c. 113, consisting of seven or more persons, having a capital of fixed amount, and being divided into shares also of fixed amount, and legally carrying on the business of banking at the time of the passing of the act, to register, having first obtained the assent of a majority of their shareholders (*d*). When registered, the provisions contained in any act of parliament, letters patent, or deed of settlement, constituting or regulating these companies when inconsistent with the Joint Stock Companies Acts of 1856 and 1857, or with the act, were no longer to apply to them (*d*).

Registration was not to take away or affect any powers previously enjoyed by the companies of banking, issuing notes payable on demand, or of doing any other thing (*d*). A banking company constituted under the 7 Geo. IV. c. 46, became insolvent, and stopped payment, but no resolution was passed for dissolving it. It was registered under the 20 & 21 Vict. c. 49, in pursuance of a resolution come to after the stoppage of the bank; it was held by Turner, L. J., that the registration was valid, for that, in order to bring a company within the 6th section, it was not necessary that it should continue to carry on business up to the time of its registration (*e*). Upon these companies being registered, the articles of Table B., prescribed by the Act of 1856, relating to shares, their transmission and forfeiture, numbered one to nineteen, were, subject to the power of alteration conferred by the Acts of 1856 and 1857, to be deemed the regula-

(*c*) 20 & 21 Vict. c. 49, s. 5.

(*d*) *Id.*, s. 6.

(*e*) *In re Northumberland and Durham District Banking Company*, 2 De G. & J. 357; 27 L. J., Chanc. 356.

tions of these companies (*f*). The act repealed the 7 & 8 Vict. c. 113, as to banking companies to be formed after the 17th of August, 1857 (*g*).

With respect to the formation of new companies it provided, that seven or more persons, associated for the purpose of banking, might register themselves other than as a limited company, subject to the condition that the shares into which the capital of the company was divided were not to be of a less amount than 100*l.* each; but that more than ten persons after the 17th of August, 1857, should not form themselves into a partnership for the purpose of banking, or, if so formed, carry on the business of banking unless registered as a company under the act (*h*).

Limited.—Before treating of limited liability banking companies, which, on account of the novelty of the principles under which they may be established, demand a separate consideration; the legislation affecting the companies mentioned in this Chapter remains to be noticed.

Joint Stock Banks under the Companies Act of 1862.—All banking companies which were registered under the 20 & 21 Vict. c. 49, or which were required to do so, except those having the liability of their members limited by act of parliament, or by letters patent, are to register under this act (*i*). Until registration, they cannot sue, although they may be sued, nor can they pay dividends, and the directors or managers are liable to a penalty of not less than 5*l.* per diem (*k*).

Upon complying with the directions of this act, as to registration, they are entitled to become an incorporated

(*f*) 20 & 21 Vict. c. 49, s. 12.

(*g*) *Id.* s. 12. The section repealed the 9 & 10 Vict. c. 75, as to Irish and Scotch banking companies, and sect. 4 required them to register under the act.

(*h*) 20 & 21 Vict. c. 49, s. 13.

(*i*) 25 & 26 Vict. c. 89, ss. 175, 176, 178, 179.

(*k*) *Id.* ss. 209, 210.

company(*l*), and the provisions contained in any act of parliament, deed of settlement, or letters patent, constituting or regulating these companies, are still to apply to them (*m*).

The Act of 1862 repeals the 20 & 21 Vict. c. 47, but re-enacts the provision of the 12th section, legalizing private banking firms of not more than ten members. Private banks may consequently consist of six or of ten partners (*n*).

With respect to the formation of new companies, it expressly enacts, that no company, association or partnership consisting of more than ten persons shall be formed after the 2nd of November, 1862, for banking purposes, unless it is registered as a company under the act, or is formed in pursuance of some other act of parliament or of letters patent (*o*). It provides, however, that seven or more persons may, by subscribing their names to a memorandum of association and complying with the requisitions of the act in other respects as to registration, form an incorporated banking company with or without limited liability(*p*). Since the facilities given to form companies upon the principle of limited liability, and the popularity which such companies have recently attained, it is not likely that banking companies will be established with unlimited liability. It is therefore deemed unnecessary to enter into the law applicable to them.

We now proceed to consider the subject of limited banking companies.

(*l*) 25 & 26 Vict. c. 89, ss. 191, 192.

(*m*) *Id.* s. 196.

(*n*) *Id.* s. 205, Third Schedule, Part 2.

(*o*) *Id.* s. 4.

(*p*) *Id.* s. 6.

CHAPTER XXVII.

LIMITED BANKING COMPANIES.

PRIOR to the year 1858, banking companies could not be legally formed with limited liability except by special acts of parliament (*a*), or by royal charters or letters patent, under the 7 Will. IV. & 1 Vict. c. 73 (*b*). In 1858, the 21 & 22 Vict. c. 91 authorized the formation and registration of banking companies with limited liability, under the Joint Stock Banking Companies Act of 1857 (*c*). The act also enabled existing unlimited banking companies to register as limited banking companies (*c*). But banking companies claiming to issue notes in the United Kingdom were not entitled to limited liability in respect of such issue, their liability remaining unlimited (*c*). Previously to a company obtaining a certificate of registration with limited liability under this act, it was necessary to give notice to its customers, or otherwise the certificate of registration, as to them, was wholly inoperative and unavailable. Before commencing business, and also on the 1st of February and the 1st of August in each year of its operations, every banking company, registering as a limited banking company, was bound to publish, in a prescribed form, a statement of its liabilities and assets (*c*). In 1862, the 21 & 22 Vict. c. 91 was repealed by the Joint Stock Companies Act of that year (*d*); but its provisions have been substantially re-enacted by the latter act.

Registering existing Companies.—Registration of exist-

(*a*) The Bank of England is an instance. The liability of the stockholders is limited to the amount of their subscriptions or shares: see 5 & 6 Will. & M. c. 20, s. 26.

(*b*) Sect. 4 enables the crown to restrict by the letters-patent or charters the liability of the members to the amount of their shares.

(*c*) 20 & 21 Vict. c. 49.

(*d*) 25 & 26 Vict. c. 89.

ing limited banking companies, under that act, is made compulsory (*d*); and until registration they are liable to certain pecuniary penalties and subject to disabilities (*e*). Banking companies, consisting of seven or more members, whose liability is unlimited, may become limited banking companies by registering under the provisions of the act. Before registering as limited banking companies they must first obtain the assent of a majority of the members present or by proxy at a general meeting summoned for the purpose (*f*).

The following documents must also be delivered to the registrar of joint stock companies (*g*), viz. :—

1. A list showing the names, addresses and occupations of all persons who, on a day named in the list, which must not be more than six clear days before registration, were members of the company, with the addition of the shares held by each member, distinguishing each share by its number.

2. A copy of the deed of settlement, royal charter, letters patent or other instrument constituting or regulating the company.

3. This list and copy must be accompanied by a statement of the following particulars, viz. : The nominal capital of the company, and the number of shares into which it is divided ; the number of shares taken, and the amount paid on each share ; the name of the company, with the addition of the word “limited,” as the last word thereof.

Where the whole or a portion of the capital has been converted into stock, the company must, instead of a statement of its shares, deliver a statement to the registrar of the amount of its stock, and of the names of the persons who were holders of stock, on some day to be named in the statement, not, however, being more than six clear days before registration (*h*). The list and particulars must

(*d*) 25 & 26 Vict. c. 89, s. 175.

(*e*) *Id.* ss. 209, 210.

(*f*) *Id.* s. 179.

(*g*) *Id.* s. 183.

(*h*) *Id.* s. 185.

be verified by a statutory declaration of the directors of the company, or of two of them (*i*).

A banking company may, for the purpose of obtaining registration with limited liability, change its name by the addition of the word "limited" (*k*).

A banking company, registering as a limited banking company, must, at least thirty days previously to obtaining a certificate of registration with limited liability, give notice, that it is intended so to register, to every person and partnership firm having a banking account with the company, and the notice must be given either by delivering the same to such person or firm or leaving the same or putting the same into the post, addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company (*l*).

In case the company omits to give this notice, the act provides "that as between the company and the person or persons only who are for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which the notice is given, but not further or otherwise, the certificate of registration with limited liability" is to be inoperative.

Banking companies issuing notes in the United Kingdom are not entitled to limited liability in respect of such issue (*m*). These companies continue subject to unlimited liability in this respect, and, if necessary, the act provides, that the assets shall be marshalled for the benefit of the general creditors and the members liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company (*m*).

Upon these provisions being complied with, the com-

(*i*) 25 & 26 Vict. c. 89, s. 186.

(*k*) *Id.* s. 190.

(*l*) *Id.* s. 188.

(*m*) *Id.* s. 182.

pany will become an incorporated limited banking company, having a common seal and a perpetual succession, with power to hold lands (*o*). In the case of a banking company in Scotland, it becomes, by virtue of the registration, a bank incorporated, constituted or established by or under act of parliament (*o*).

The certificate of incorporation, when obtained, will be conclusive evidence of the company having complied with the provisions of the act in respect of registration, and of being authorized to be registered as a limited company. The date of incorporation mentioned in the certificate will be considered as the date of its incorporation (*p*).

Effect of Registration of existing Companies.—On registration, the provisions in the act of parliament, deed of settlement, letters patent, or other instrument constituting or regulating the company, will apply to the limited company, as well as the provisions of the Act of 1862, and to the members, contributories and creditors, as if the company had been originally formed under that act (*q*).

All the property of the company, its interests and rights existing at the date of its registration, pass to and vest in the incorporated company (*r*). Registration is not to affect or prejudice the liability of the company to have enforced against it, or its right to enforce, debts, obligations or contracts (*s*). Actions and suits and other legal proceedings pending against the company, or its members or public officer, at the time of its registration, may be continued. Execution, however, is not to issue against the effects of an individual member upon any judgment, decree or order; but, in the event of the property and effects of the company being insufficient to satisfy these liabilities, an order may

(*o*) 25 & 26 Vict. c. 89, s. 191. The section also prescribes the fees payable on registration of unlimited banking companies. See Table of Fees, post, p. 471, n.

(*p*) *Id.* s. 192.

(*q*) *Id.* s. 196.

(*r*) *Id.* s. 193.

(*s*) *Id.* s. 194.

be obtained for winding up the company (s). The mode of winding up and the liabilities of its members will form the subject of a separate chapter.

Limited Banks under the Companies Act of 1862.—Private banking firms, consisting of six or of ten members, as already observed (t), may now legally carry on banking business without being registered as banking companies; but such firms cannot legally carry on business as limited banking companies without registration, inasmuch as before the act private banking firms, limiting the liability of their members, were either illegal or unknown.

Since the 2nd of November, 1862, when the Companies Act of that year came into operation, limited banking companies can only be legally formed and registered under its provisions. It is the act at present in force on the subject.

When, therefore, it is proposed to establish a banking company in England, Ireland or Scotland, on the principle of having the liability of its members limited to the amount of their shares, or in the words of the statute, a company limited by shares (u), seven persons at the least must subscribe a memorandum of association (v), containing the following particulars:—

1. The name of the company, with the addition of the word “limited” at the end of the name.

2. The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is situate.

3. The objects for which the company is established.

4. A declaration of the liability of the members being limited.

5. The amount of its capital divided into shares of a fixed amount.

(s) 25 & 26 Vict. c. 89, s. 195.

(t) Ante, p. 464.

(u) 25 & 26 Vict. c. 89, s. 8.

(v) *Id.* s. 6. See a form of a memorandum of association of a limited bank in Shelford's Law of Joint Stock Companies, page 481.

Each subscriber cannot take less than one share, and must write his name opposite to the number of shares which he takes (*x*).

The memorandum must be stamped as a deed, and signed by each subscriber, in the presence of a witness, who must attest his execution (*x*).

A company may modify or alter the memorandum, if authorized by its regulations or by special resolution, as to increase the capital by the issue of new shares, or to consolidate and divide the capital into shares of larger amount than the existing shares, or to convert the paid up shares into stock (*y*). With these exceptions, and of changing the name, as mentioned hereafter, the act provides, that no other alterations shall be made by any company in the conditions contained in the memorandum (*y*).

In the case of a limited banking company, the memorandum is usually and necessarily accompanied with articles of association prescribing and defining the constitution, business and capital of the company, the amount, allotment, transfer and forfeiture of shares, the calls, the meetings of members, the number of their votes, the appointment, qualification, remuneration, powers and duties of directors and of officers, auditing the accounts, and such other regulations as the subscribers of the memorandum may deem expedient (*z*). The company may adopt, modify or exclude all or any of the provisions of Table A. given by the act (*z*). These provisions are usually embodied in the articles. The articles must be separately paragraphed and numbered arithmetically (*z*), printed and stamped as a deed, and signed by each subscriber, in the presence of a witness (*a*). The memorandum and articles

(*x*) 25 & 26 Vict. c. 89, ss. 8, 12.

(*y*) *Id.* s. 12.

(*z*) *Id.* s. 14. See a form of articles of association of a limited banking company in Shelford's *Law of Joint Stock Companies*, page 483; and *Croskey v. Bank of Wales (Limited)*, 4 Giff. 314: and an epitome of a deed of settlement of an unlimited banking company in Wordsworth's *Mining, Banking and Insurance Companies*, Appendix of Forms, 202, 6th edition.

(*a*) *Id.* s. 16.

must be delivered to the registrar for registration (*b*). Upon registration they bind the company and its members as if each member had executed these instruments as deeds (*c*). The registrar thereupon grants a certificate of the incorporation of the company by the name contained in the memorandum of association, as a banking company, limited, whose members, in the event of its being wound up, will be liable only to the amounts remaining unpaid upon their respective shares. The certificate is conclusive as to the fact of the company having complied with the requirements of the act with regard to registration (*d*).

The fraudulent alteration of the articles, after they have been signed, will relieve the members from their obligations contracted by the memorandum (*e*).

The company may, by passing special resolutions in general meetings, from time to time, add to or alter its

(*b*) *Id.* ss. 16, 17. Sect. 17 prescribes, in Table B., the fees payable on registration of the memorandum and articles, viz.:—

For registration of a company whose nominal capital does not exceed 2,000 <i>l.</i> , a fee of	£	s.	d.
	2	0	0

For registration of a company whose nominal capital exceeds 2,000*l.*, the fee of 2*l.*, with the following additional fees, regulated according to the amount of nominal capital; (that is to say,)

For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 2,000 <i>l.</i> , up to 5,000 <i>l.</i>	1	0	0
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For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 5,000 <i>l.</i> , up to 100,000 <i>l.</i>	0	5	0
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For every 1,000 <i>l.</i> of nominal capital, or part of 1,000 <i>l.</i> , after the first 100,000 <i>l.</i>	0	1	0
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For registration of any increase of capital made after the first registration of the company, the same fees per 1,000*l.*, or part of 1,000*l.*, as would have been payable if such increased capital had formed part of the original capital at the time of registration.

Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50*l.*, taking into account in the case of fees payable on an increase of capital after registration the fees paid on registration.

For registration of any existing unlimited banking company, the same fee as is charged for registering a new company.

For registering any document required or authorized to be registered, other than the memorandum of association ..	0	5	0
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For making a record of any fact authorized or required to be recorded by the registrar, a fee of	0	5	0
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(*c*) *Id.* s. 16.

(*d*) *Id.* s. 18.

(*e*) *Felgate's Case*, 11 L. T., N. S. 613.

regulations, and these regulations are to be deemed of the same validity as if they had been originally in the articles of association. These regulations may be altered or modified by subsequent special resolutions (*f*).

Articles of association empowered the directors of a bank, without any further authority from the shareholders, to pay a gross sum of 6,000*l.* for the costs and expenses of the promoter, who was a solicitor; it was held, that a payment without taxation was not improper or illegal (*g*).

A copy of the memorandum, with the articles of association, must be forwarded to every member at his request, on the payment of 1*s.*, or a less sum, if prescribed by the regulations of the company, for the copy. If the company neglects to forward a copy, it will incur a penalty not exceeding one pound (*h*).

Name.—A banking company must not assume or adopt the name of an existing company, or be registered in a name identical with the name of an existing company (*i*). If by inadvertence a company is so registered, it may, with the sanction of the registrar, change its name, and the registrar is to enter the new name on the register, and issue a certificate accordingly. Should a banking company wish

(*f*) 25 & 26 Vict. c. 89, s. 50.

(*g*) *Croskey v. Bank of Wales (Limited)*, 4 Giff. 314.

(*h*) 25 & 26 Vict. c. 89, s. 19.

(*i*) *Id.* s. 20. In an action against a banking company, the declaration stated that the plaintiff had established a bank, called "The Bank of London," at great expense, and caused the name to be published and affixed to the offices of the bank, and prospectuses to be issued, and that the defendants afterwards fraudulently established another bank under the style of "The Bank of London," in imitation of the Bank of London of the plaintiff, by reason of which he was prevented from carrying on his business at his bank so fully as he otherwise would, and was deprived of gains and profits: it was held, that the declaration was bad for not showing that the plaintiff carried on the business of a banker. Jervis, C. J., said, "All that appears is, that the plaintiff was the promoter of a certain bank, called 'The Bank of London,' which he proposed to establish in the city of London, and that he incurred expense in putting up the name on a brass plate and in publishing prospectuses, and that some one else had beaten him in the race and established a bank under the same name by virtue of letters-patent. It did not appear that the plaintiff had even carried on the business of banking, or that he had a single customer, or that he was in a position to be damnified by the acts of the defendants." *Lawson v. Bank of London*, 18 C. B. 84; 2 Jur., N. S. 18.

to change its name after incorporation, provision is made for enabling it to do so by passing a special resolution, and obtaining the approval of the Board of Trade (*j*).

Special provisions are made for the widest possible publication of the name. The company must paint or affix, and keep painted or affixed, its name on the outside of every office or place in which it carries on business, in a conspicuous position, in letters easily legible, and must have its name engraved in legible characters on its seal, and its name mentioned in legible characters in all notices, advertisements and official publications, and in all bills of exchange, promissory notes, indorsements, cheques and orders for money, purporting to be signed by or on behalf of the company, and in all its receipts and letters of credit (*k*).

A penalty not exceeding 5*l.* will be incurred by a company for non-publication in the mode prescribed (*l*).

A director, manager or officer, or any person on the behalf of the company, using any but its engraved seal, or issuing any notice, advertisement, or official publication, or signing, on behalf of the company, any bill of exchange, promissory note, indorsement, cheque, order for money or letter of credit, in which the name of the company is not mentioned, will incur a penalty of 50*l.* He will also be personally liable to the holder of such bill, note, cheque or order for the full amount, unless duly paid by the company (*l*).

Registered Office.—The company must also have a registered office of business. A company not having one will incur a penalty not exceeding 5*l.* for every day business is carried on (*m*). Notice of the situation of the registered office, as well as of any change, is to be given to the registrar, and recorded by him. Until such notice, the company will not have complied with the act (*n*).

(*j*) 25 & 26 Vict. c. 89, s. 13.

(*k*) *Id.* s. 41.

(*l*) *Id.* s. 42.

(*m*) *Id.* s. 39.

(*n*) *Id.* s. 40.

Capital.—The shares of the members are personal estate, transferable according to the regulations of the company; distinguishable by appropriate numbers (*o*). But shares of deceased members may be transferred by their personal representatives, although not themselves members (*p*). Notice of an increase of the registered capital of the company, whether the shares be converted into stock or not, must be given to the registrar within fifteen days after the resolution authorizing the increase (*q*). The registrar is to record the amount of the increase (*q*).

So a company that has consolidated or divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, is required to give notice thereof to the registrar (*r*). A company which neglects to give notice of increasing its capital within the time mentioned, and a director or manager authorizing the same, will incur a penalty not exceeding 5*l.* for every day of the default (*s*). Notice of trusts, expressed, implied or constructive, cannot be entered on the register, or be receivable by the registrar (*t*).

A certificate under the seal of the company of the shares or stock held by a member will be *primâ facie* evidence of his title (*u*).

Members.—The act defines the members to be subscribers of the memorandum of association, and every other person, who has agreed to become a member, and whose name is entered on the register required to be kept by the company (*x*). The articles of association generally prescribe that a written application for shares, followed by an allotment, shall be deemed an acceptance of the shares. An acceptance in this form will be binding, and a sufficient authority for placing the name of an allottee on the register. A person, who is induced to sign the articles upon a

(*o*) 25 & 26 Vict. c. 89, s. 22.

(*p*) *Id.* s. 24.

(*q*) *Id.* s. 34.

(*r*) *Id.* s. 28.

(*s*) *Id.* s. 34.

(*t*) *Id.* s. 30.

(*u*) *Id.* s. 31.

(*x*) *Id.* s. 23.

promise that is not fulfilled, or to take shares by deception, is still a shareholder, and his remedy will be against those who deceived him, and not against the company (*y*).

The liability of members as contributories will be separately considered.

Register of Members.—The register required to be kept by the company must contain the following particulars (*z*), viz.:—

- (1.) The names and addresses, and the occupations, if any, of the members of the company; a statement of the shares held by each member, distinguishing each share by its number; and the amount paid or agreed to be considered as paid on the shares of each member:
- (2.) The date at which the name of any person was entered in the register as a member:
- (3.) The date at which any person ceased to be a member.

A company, director or manager acting in contravention of these provisions will incur a penalty not exceeding 5*l.* for every day of noncompliance (*a*).

When any portion of the shares of the company has been converted into stock, the register must show the amount of stock held by each member instead of shares (*a*).

The register will be *primâ facie* evidence of its contents (*b*).

Annual List of Members.—An annual list of all persons, who are members on the fourteenth day succeeding that on which the first of the ordinary general meetings of the company is held, must be made out, containing their names, addresses and occupations, and the number of shares held

(*y*) *Felgate's Case*, 11 L. T., N. S. 613.

(*z*) 25 & 26 Vict. c. 89, s. 25.

(*a*) *Id.* s. 29.

(*b*) *Id.* s. 37.

by each, and the following summary of particulars (c), viz. :—

- (1.) The amount of the capital of the company, and the number of shares into which it is divided :
- (2.) The number of shares taken from the commencement of the company up to the date of the summary :
- (3.) The amount of calls made on each share :
- (4.) The total amount of calls received :
- (5.) The total amount of calls paid :
- (6.) The total amount of shares forfeited :
- (7.) The names, addresses and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

This list and summary must be in a separate part of the register, and completed within seven days after the day mentioned for its being made out ; and a copy forthwith forwarded to the registrar (c). A company neglecting to forward the list or summary will incur a penalty not exceeding 5*l.* for every day, and a director or manager permitting the same a similar penalty (d).

Where any of the shares of the company have been converted into stock, the list must show the amount of stock held by each member instead of the amount of his shares (e).

Rectifying Register.—In case of any errors or misstatements being introduced into the register, provision is made for their correction. If the name of any person is entered in or omitted from the register (f), or default is made, or unnecessary delay takes place in entering, the fact of any person having ceased to be a member, the person or member aggrieved, or any other member, or the company

(c) 25 & 26 Vict. c. 89, s. 26.

(d) *Id.* s. 27.

(e) *Id.* s. 29.

(f) *Id.* s. 35.

itself, may apply to a superior court of law or equity for an order to rectify the register. The court may refuse the application with or without costs; or, if satisfied of its justice, may order a rectification of the register, and the company to pay the costs and any damages the party aggrieved may have sustained (*f*).

The court may also decide questions relating to the title of the applicant, or arising between two or more members or alleged members (*f*). When the court orders the register to be rectified, notice must be given to the registrar of the amendment or alteration (*g*).

Inspection of Register.—A register of members, commencing from the date of the registration of the company, must be kept at its registered office for inspection by the members gratis, and by other persons on the payment of 1s. or a less sum, if prescribed by the company, for each inspection. A member or any other person may require a copy of the register, or of the list of members or summary of particulars on the payment of 6d. for every hundred words copied. Should an inspection or copy be refused, the company, director or manager will incur a penalty not exceeding 2l., and an additional penalty not exceeding 2l. for every day the refusal continues (*h*).

In addition to these penalties, a judge at chambers may order an immediate inspection. The company may, by giving notice in any newspaper circulating in the district where its registered office is situate, close the register for a period not exceeding thirty days in each year (*h*).

Issuing Promissory Notes and Bills of Exchange.—With respect to these instruments, the act provides that they are to be deemed to have been made, accepted or indorsed on behalf of the company, if made, accepted or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or

(*f*) 25 & 26 Vict. c. 89, s. 35.

(*g*) *Id.* s. 36.

(*h*) *Id.* ss. 32, 33.

indorsed by or on behalf or on account of the company by any person acting under the authority of the company (*i*). A manager or a director accepting or indorsing a bill of exchange in the name or on the behalf of a company omitting the word "limited" will be personally liable thereon (*k*). But where a promissory note was signed by persons describing themselves as directors of a limited company, and countersigned by the secretary of the company, as follows:—

"London, December 31, 1856.—Three months after date we jointly promise to pay Mr. Frederic Shaw or order 600*l.* for value received in stock, *on account* of the London and Birmingham Hardware Company, Limited:—" it was held, that the directors who signed it were not personally liable on the note (*l*).

Statement of Assets and Liabilities.—As a protection to creditors and others, the act imperatively requires the publication of a statement of its capital, assets and liabilities twice a year, and a register of the company's mortgages to be kept. With respect to the statement, the act enacts, that every limited banking company shall, before it commences business, and also on the first Monday in February and first Monday in August in every year, make a statement in a form prescribed (*m*), or as near thereto

(*i*) 25 & 26 Vict. c. 89, s. 47.

(*k*) *Penrose v. Martyn*, El. Bl. & El. 499; 28 L. J., Q. B. 28.

(*l*) *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J., Exch. 326.

(*m*) Form (D.), which is as follows:—

The capital of the company is —, divided into — shares of — each.

The number of shares issued is —.

Calls to the amount of — pounds per share have been made, under which the sum of — pounds has been received.

The liabilities of the company on the first day of January (or July) were—

Debts owing to sundry persons by the company:—

On judgment, £

On specialty, £

On notes or bills, £

On simple contracts, £

On estimated liabilities, £

as circumstances will admit. A copy of the statement is to be put up in a conspicuous place in the registered office, and in every branch or place where the business of the company is carried on. If default is made in compliance with these provisions, the company is liable to a penalty not exceeding 5*l.* for every day of default; and a director or manager permitting the same incurs a similar penalty (*n*). Members and creditors are entitled to a copy of the statement on payment of a sum not exceeding sixpence (*n*).

Register of Mortgages.—All mortgages and charges *specifically* affecting property of the company must be kept in a register. A short description of the property, the amount of the charges created, and the names of the mortgagees or persons entitled to the charges must be entered. If these entries are not made, every director, manager or other officer who knowingly and wilfully authorizes or permits the omission will incur a penalty not exceeding 50*l.* (*o*).

This register is to be open to the inspection of creditors and members at all reasonable times. Should an inspection be refused by any officer, director or manager, a penalty not exceeding 5*l.* is incurred, and a further penalty not exceeding 2*l.* for every day of continued refusal. A judge at chambers may order an immediate inspection of the register (*o*).

Meetings and Minutes.—A general meeting of the company must be held once at the least in every year (*p*).

The minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers,

The assets of the company on that day were :—

Government securities [*stating them*], £

Bills of exchange and promissory notes, £

Cash at the bankers, £

Other securities, £

A deposit company is also bound to make the above statement.

(*n*) 25 & 26 Vict. c. 89, s. 44. (*o*) *Id.* s. 43. (*p*) *Id.* s. 49.

must be duly entered in books provided for the purpose (*q*). These minutes, if purporting to be signed by the chairman of the meeting at which the resolutions were passed or proceedings had, or by the chairman of the next meeting, will be receivable as evidence in legal proceedings (*q*).

These minutes, when made, will be *primâ facie* evidence of the due holding of the meetings, passing of the resolutions and proceedings, the appointment of directors, and the validity of their acts, notwithstanding the discovery of any defects in their appointments or qualifications afterwards (*q*).

Special Resolutions.—A resolution is special when passed by a majority of not less than three-fourths of the members entitled, according to the regulations of the company, to vote, either in person or by proxy, at a general meeting, of which notice to propose the resolution has been given and confirmed by a majority of such members at a subsequent general meeting held at an interval of not less than fourteen days or more than a month from the first meeting (*r*). Unless a poll is demanded by at least five members, a declaration of the chairman at the meeting, that the resolution has been carried, is conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the resolution. Notice of meetings will be deemed duly given, and the meetings duly held, whenever the notice has been given and the meetings are held in the manner prescribed by the regulations of the company. In computing the majority when a poll is demanded, reference is to be had to the number of votes to which each member is entitled by the regulations of the company (*r*).

A copy of every resolution in force must be annexed to or embodied in every copy of the articles of association issued after the passing of the resolution (*s*). A company

(*q*) 25 & 26 Vict. c. 89, s. 67. (*s*) *Id.* s. 54.
(*r*) *Id.* s. 51.

making default will incur a penalty not exceeding 1*l.* for each copy so issued; and a director or manager knowingly and wilfully authorizing or permitting the issue will incur a similar penalty (*t*).

Registry of Special Resolutions.—A copy of every special resolution must be printed, and forwarded to the registrar, in order to be recorded by him. If a copy is not forwarded within fifteen days after the confirmation of the resolution, the company will incur a penalty not exceeding 2*l.* for every day afterwards; and a director or manager will incur a similar penalty (*u*).

Notices and Legal Proceedings.—Notices, summonses and other documents may be served by delivering, leaving or posting the same in prepaid letters addressed to the company at their registered office (*x*).

A writ cannot be so served upon the company or a director, but only upon the manager or secretary of the company (*y*). Proof that the notices were posted in time, properly addressed and stamped, will be sufficient (*z*).

A summons, notice or other document, requiring to be authenticated by the company, may be signed by any director, secretary or other authorized officer; and it is not necessary to be under the seal of the company, and may be in writing or in print, or partly in writing and partly in print (*a*).

In actions or suits brought by the company against any member, to recover calls or monies due from such member in his character of member, it will not be necessary to set forth the special matter, but sufficient to allege that the defendant is a member of the company, and is indebted

(*t*) 25 & 26 Vict. c. 89, s. 54.

(*u*) *Id.* s. 53.

(*x*) *Id.* s. 62.

(*y*) *Towne v. London and Limerick Steamship Company*, 5 C. B., N. S. 730.

(*z*) 25 & 26 Vict. c. 89, s. 63.

(*a*) *Id.* s. 64.

to the company in respect of a call made or other monies due whereby an action or suit has accrued to the company (*b*).

If it appears in such actions, by any creditable testimony, that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, a judge may require security for costs to be given by the company, and stay all proceedings until security is given (*c*).

The pecuniary penalties imposed by the act may be summarily recovered before justices of the peace (*d*).

Examination of Affairs by Inspectors.—An examination into the affairs of a banking company may often be desirable, in cases of rumours of losses or delinquencies of directors. The act gives power to the Board of Trade, or to members, to appoint inspectors for the purpose of reporting thereon. In the case of the Board of Trade, the application must be made by members holding not less than one-third of the entire shares of the company (*e*). It must be supported by such evidence as the Board of Trade may require, for the purpose of showing that the applicants have good reason for demanding the investigation, and that they are not actuated by malicious motives in instituting the inquiry. The Board of Trade may require security for costs to be given before appointing the inspectors (*f*).

It will be the duty of the officers of the company, on the inquiry, to furnish the inspectors with all information in their power, and to produce their books and documents, and the officers may be examined on oath (*g*).

If an officer should refuse to produce the books or documents, or to answer questions relating to the affairs of the

(*b*) 25 & 26 Vict. c. 89, s. 70.

(*c*) *Id.* s. 69.

(*d*) *Id.* s. 65.

(*e*) *Id.* s. 56.

(*f*) *Id.* s. 57.

(*g*) *Id.* s. 58.

company, he will incur a penalty of not less than 5*l.* for each offence (*h*).

Upon the conclusion of the examination the inspectors are to report their opinion, which may be either written or printed, to the Board of Trade (*i*). A copy of the report is to be forwarded by the Board of Trade to the registered office of the company, and to the members at whose instance the inspection was demanded, if they require it. These persons will have to defray the expenses of the investigation, unless the Board of Trade otherwise directs them to be paid out of the assets of the company (*i*).

In the case of a company being authorized by a special resolution, it may appoint inspectors to examine into the state of its affairs (*k*); the inspectors being clothed with the same powers and entrusted with the same duties as the inspectors appointed by the Board of Trade, with this exception, that their report is to be made in such manner and to such persons as the company in a general meeting of its members directs. Their officers will incur similar penalties by refusing to produce books or documents, or answer questions, as under an examination conducted by the inspectors of the Board of Trade (*k*).

A copy of the report, authenticated by the seal of the company, will be admissible in legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report (*l*).

(*h*) 25 & 26 Vict. c. 89, s. 58.

(*i*) *Id.* s. 59.

(*k*) *Id.* s. 60.

(*l*) *Id.* s. 61.

CHAPTER XXVIII.

CHARTERED BANKS.

BANKS may be formed under the 7 Will. IV. & 1 Vict. c. 73, by royal charters or letters patent. The charters are obtained by petitioning the Queen in council. The petition and draft of a proposed charter are left at the Council Office and afterwards referred to the Board of Trade. The Colonial Office and India Office are also referred to if the proposed company falls within their departments. If it is determined that a charter shall be granted, it issues under the great seal (*a*). The liability of the members is usually limited by the letters patent to the amount of their respective shares (*b*), and legal proceedings by or against the companies are directed to be taken and prosecuted in the name of a public officer appointed for the purpose (*c*). The charters are generally for limited periods, but they are renewable (*d*). Previously to an application to the Board of Trade for a charter, notices must be inserted in the Gazette and other newspapers (*e*). A bank incorporated under this act cannot be registered under the Act of 1862 as an unlimited company (*f*), or, when registered as a limited company, alter any provision contained in the letters patent relating to the company, without the sanction of the Board of Trade (*g*). Of recent years it has not been the policy or practice of the government to advise the Queen to grant charters for the establishment of banking companies in the colonies or in India, preferring to leave these matters to the free action of the Colonial or Indian governments themselves.

(*a*) Wordsworth's Joint Stock Companies, page 235, 6th edition.]

(*b*) 7 Will. 4 & 1 Vict. c. 73.

(*c*) *Id.* s. 3.

(*d*) *Id.* s. 29.

(*e*) *Id.* s. 32.

(*f*) *Id.* s. 179.

(*g*) *Id.* s. 196.

CHAPTER XXIX.

IRISH AND SCOTCH BANKS.

WITH respect to Irish Banks, the 6 Geo. IV. c. 42, which is still in force as to banking copartnerships or societies established in Ireland under its provisions, enables them to sue and to be sued in the names of their public officers, and requires a return of their members to be made to the Stamp Office. That act, however, impliedly repealed the Irish Act, 33 Geo. II. c. 14 (*a*).

The 7 Geo. IV. c. 67, enabled banking copartnerships established in Scotland to sue and be sued by public officers, and the returns of the names of their firms, members and officers are required to be made to the Stamp Office by these copartnerships. An omission to make these returns does not, however, disentitle them to sue in this country (*b*).

In 1846, the provisions of the 7 & 8 Vict. c. 113, giving the crown powers to grant letters patent of incorporation to English joint stock banks for a term of years not exceeding twenty, were extended by the 9 & 10 Vict. c. 75, to both Irish and Scotch joint stock banks.

Subsequently the 19 & 20 Vict. c. 3, further extended the provisions of the English statute in favour of Scotch joint stock banks existing before the 9th of August, 1845, by enabling the crown to grant to them letters patent of incorporation, in perpetuity, in lieu of a limited maximum

(*a*) *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142. The previous imperial acts of parliament affecting banking institutions in Ireland are the 1 & 2 Geo. 4, c. 72 and 5 Geo. 4, c. 73. The provisions of the 1 & 2 Vict. c. 96, made perpetual by 5 & 6 Vict. c. 85, applied to banking copartnerships established in Ireland under the 6 Geo. 4, c. 42. The 6 Geo. 4, c. 42, above mentioned is similar to the 7 Geo. 4, c. 46, regulating English banking copartnerships.

(*b*) *Bonar v. Mitchell*, 5 Exch. 415; 19 L. J., Exch. 302.

of twenty years only. In 1857, banks, which had been formed in Scotland or in Ireland under these statutes, were required by the 20 & 21 Vict. c. 49, to register under that act, and, in default of registration, they were subject to certain penalties and disabilities (*c*). That act also repealed the 9 & 10 Vict. c. 75, and prohibited the future formation of banking companies either in Scotland or in Ireland, except under its provisions. In 1858, limited banking companies might be formed in Scotland or in Ireland under the 21 & 22 Vict. c. 91. In 1862, this act was afterwards repealed by the 25 & 26 Vict. c. 89 (*d*). The latter act imperatively requires banking companies, formed under the provisions of the repealed act, to register under the new act (*e*).

The issue of bank notes in Ireland is regulated by the 8 & 9 Vict. c. 37, and in Scotland by the 8 & 9 Vict. c. 38.

As the provisions of the new act for the formation, regulation and registration of banking companies of limited or unlimited liability in Scotland and in Ireland are the same as in England, it will be only necessary to refer the reader to the previous chapters on these subjects.

(*c*) 20 & 21 Vict. c. 49, s. 5.

(*d*) Sect. 205, Third Schedule, First Part.

(*e*) Sects. 180, 209, 210.

CHAPTER XXX.

COLONIAL, INDIAN AND FOREIGN BANKS.

BANKING institutions are generally established in the colonies and in India by virtue of charters from the crown, or under the authority of local laws, corresponding in a great measure with the English laws on the subject. By an act of a colonial legislature, it was provided that a banking company should sue and be sued in the name of its chairman, and that execution on any judgment against the company might be enforced against the property of any member for the time being, in like manner as if the judgment had been obtained against such member personally. In an action against a member in this country, on a judgment obtained in the colony against the chairman, it was decided, that the colonial legislature had authority to pass the act, and that there was nothing repugnant to the laws of England or to natural justice in enacting that actions on contracts made by the company in the colony, instead of being brought against the members individually, should be brought against the chairman whom they had appointed to represent them, and that a judgment recovered in such an action, after service of process on the chairman, had the same effect beyond the territorial limits of the colony which it would have had if the defendant had been personally served with process, and, he being a party to the record, the judgment had been personally against him (a).

So where, by an act of the Indian legislature, a banking company established at Calcutta might be sued in the name of its secretary, and a judgment against him was to have the like effect against the property of the bank as if recovered against all the members, as parties on the record,

(a) *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661.

but provided that, if an execution issued against the property of the bank were ineffectual, execution should issue against the members successively, and if that were also ineffectual, then against any person who was a member at the time when the contract sued upon was entered into, but no execution was to be issued against any other person than the actual party to the suit without the leave of the court, and notice given to the person to be charged. A creditor, having recovered a judgment in India against the secretary of the bank for a breach of contract entered into by the company there, took no further proceedings in India, but immediately brought an action against a member who was so at the time the contract was entered into, and recovered judgment in this country on the judgment and the contract, and it was held that he was entitled to do so, and to recover in respect of both causes of action (*b*). "It has been urged," said the court in delivering their judgment, "that, when the defendant consented to be bound by a judgment recovered, not against himself in his own name, but against another who represented him, he should be considered as having consented only on condition that proceedings on the judgment were pursued in the manner appointed by the act. But he must have known that that act would have no effect in this country. He therefore consented to be sued in the name of the public officer in India, and to be liable to all the consequences which might arise out of it in this country" (*c*).

With regard to foreign banks, they are entitled to sue in this country by the name by which they are incorporated or known, or in the manner prescribed by the laws of the country in which they are established (*d*). Foreign banks frequently have agencies in this country for the negotiation or payment of their bills or notes.

(*b*) *Kelsall v. Marshall*, 1 C. B., N. S. 241; 26 L. J., C. P. 19.

(*c*) *Id.*, 26 L. J., C. P. 23, per Cresswell, J.

(*d*) *National Bank of St. Charles v. De Bernales*, R. & M. 191; 1 C. & P. 569; *La Banca Nazionale Sede Di Torino v. Hamburger*, 2 H. & C. 330; 11 W. R. 1074.

CHAPTER XXXI.

BRANCH BANKS.

By the deed of settlement or articles of association, power is usually reserved to the directors to establish branch banks in different parts of the country.

Where a banking company was established in 1836, by a deed which provided that the business of the company should be carried on at D., and such other places as might afterwards be chosen with the consent of all the directors. In 1839, a branch bank was established at C., which continued until 1843, when an action was brought against a shareholder, who had executed the deed of 1836, to recover a sum of money deposited in it: it was held, that it might be presumed, either that the branch bank had been established in compliance with the provisions of the deed, or that the shareholder knew of, and was a consenting party to, carrying on business at the branch (*a*).

A limited banking company having branches must affix or put up in a conspicuous part of these banks a copy of the statement of its capital, assets and liabilities as required by 25 & 26 Vict. c. 89, s. 44 (*b*).

A branch bank is considered, for some purposes, as a distinct establishment from every other branch of the concern. Thus, where a bill of exchange was indorsed to a Branch Bank of the National Provincial Bank of England established at A., who sent it to another branch established at B., who indorsed it to the head establishment in London, it was held, in an action upon the bill by the indorsee against the drawer, that each of the branch

(*a*) *Crellin v. Calvert*, 14 M. & W. 11; 14 L. J., Exch. 375.

(*b*) See ante, p. 478.

banks was to be considered as an independent indorsee, and each entitled to notice of dishonour (c).

So, where there was a banking company having branches at many places, among others at G. and B., and each branch had a separate manager, and kept separate accounts with its respective customers, whom each supplied with cheque books headed with the name of the place at which it respectively carried on business; and a customer, who kept an account with the G. branch, made a payment of a debt which he owed the defendant, by giving him a cheque for the amount of it on the G. branch, which the defendant presented the same day at the B. branch, where he was known and where he got cash for it, and it was sent by the B. branch by the first post to the G. branch, and delivered to them next day; but in the meantime the customer's balance with them had been drawn out, and the cheque was accordingly refused payment, and notice of dishonour given to the defendant, who was obliged to refund in an action for money had and received brought against him by the public officer of the banking company; the court considering that the drawer of the cheque did not stand in the relation of customer to the B. branch; that the giving cash for the cheque did not amount to a purchase of the cheque by that branch, but only amounted to changing it, and that the cheque was not drawn on the company generally (d).

The subject of branch banks established by the Bank of England has already been considered (e).

(c) *Clode v. Bayley*, 12 M. & W. 51; and *Brown v. London and North Western Railway Company*, 4 B. & S. 330, 337.

(d) *Woodland v. Fear*, 7 El. & Bl. 519; 26 L. J., Q. B. 202.

(e) Ante, 366.

CHAPTER XXXII.

SHARES, CALLS AND SHAREHOLDERS.

Shares—Personal Property.—The shares of the members of banking copartnerships or companies, whether formed under deeds of settlement or articles of association, are personal property, and are generally subject to all the legal incidents which attach to personal property.

The shares of a banking copartnership, established in conformity with the 7 Geo. IV. c. 46, have been held, both at law (*a*) and in equity (*a*), the property of which consisted in part of freehold and copyhold estates, and mortgages for terms of years, to be personalty, and not realty, and legally bequeathable to charitable purposes, within the Mortmain Act, 9 Geo. II. c. 36. The shares or interests of members in companies, formed under the Act of 1862, are expressly declared to be personal estate, transferable in the manner provided by the regulations of the companies and not real estate (*b*). The shares in all banking copartnerships are usually numbered, and they should be before being issued or allotted by limited banking companies (*b*); and the shares are represented by certificates corresponding with the numbers and amounts of the shares.

A., purchased some shares in a banking company, and had them transferred into the joint names of herself and B. By the regulations of the company there was no benefit of survivorship between shareholders. B., however, survived A., and there was clear evidence to show that A. intended the shares for B. absolutely. It was held that the legal title was complete in B., and that she was entitled to them by survivorship (*c*).

(*a*) *Myers v. Perigal*, 2 De G., Mac. & G. 600; 11 C. B. 90.

(*b*) 25 & 26 Vict. c. 89, s. 22.

(*c*) *Garrick v. Taylor*, 29 Beav. 79; 30 L. J., Chanc. 211; affirmed on appeal, 31 L. J., Chanc. 68.

Certificates.—Scrip certificates for shares, on being issued to subscribers, must bear a penny stamp thereon (*d*). Certificates for shares may be deposited or pledged with bankers for advances, without notice being given to the company and without incurring the risk of losing their lien in the event of bankruptcy.

Therefore, where A. deposited with B. share certificates in a company, as a security for a loan, and afterwards assigned all his personal estate to trustees for the benefit of his creditors, the trustees gave notice of the assignment to the company, but B. omitted to give notice of his equitable lien, it was held, that, notwithstanding the omission to give such notice, the trustees could not maintain an action against B. for the certificates, who was not guilty of a wrongful conversion or detention of the shares, as they were deposited with him as a security for a debt (*e*). So, where the secretary and manager of a registered joint stock company, having previously to his bankruptcy deposited the certificates of his shares in the company with a banker by way of equitable mortgage, to secure the repayment of monies advanced to him by the bank for the use of the company, and for which monies he and his co-directors had given their joint and several note of hand, it was held that such shares did not pass to his assignees as being in his order and disposition at the time of his bankruptcy, and that the bank was entitled to retain the shares so deposited, although no formal notice had been given to the company (*f*). But a stock broker, who is entrusted with share certificates for sale, has no power to pledge them with his bankers for his own private debt, and, on discovering the fraud, the owner of the shares may recover them from the bankers (*g*).

Purchase or Sale of Shares.—A contract for the sale of shares in a banking company is not a contract for the sale

(*d*) 16 & 17 Vict. c. 63, s. 8.

(*e*) *Broadbent v. Varley*, 12 C. B., N. S. 214.

(*f*) *Ex parte Stewart, In re Shelley*, 13 W. R. 356; *per* Lord Westbury, C.

(*g*) *Freeman v. Appleyard*, 32 L. J., Exch. 175.

of "goods, wares or merchandise," within the 17th section of the Statute of Frauds, so as to require a written memorandum (*g*). But a note or memorandum of the contract for the sale or purchase of such shares, when to the amount or value of 5*l.* or upwards, requires a penny stamp (*h*). A person who is induced to become a purchaser of shares in a banking company under false or fraudulent representations made by the directors or others, as to the financial position and circumstances of the bank, may refuse to perform his contract (*i*). But if he has accepted the shares, or registered the transfer, and the bank afterwards fails, he cannot repudiate his liability as a shareholder (*i*). His remedy will be against the parties deceiving him for the recovery of the purchase money, and the calls which he has paid (*j*).

A power of attorney to sell shares does not, without express words, give authority to pledge (*k*). By the regulations of most banking copartnerships, the consent of the directors is necessary before a shareholder can transfer his shares to a purchaser (*l*).

It follows, therefore, that no contract can be made between a shareholder and the intended purchaser for the sale of shares, except conditionally, that is to say, the contract must be made, either in terms or impliedly, contingent on the event of the directors consenting to the proposed transfer; also the deed of transfer must be considered to be executed provisionally; and the purchase money can only be safely paid to the vendor after the transfer is registered (*m*).

(*g*) *Humble v. Mitchell*, 11 A. & E. 205.

(*h*) 23 & 24 Vict. c. 111. By sect. 7 the stamp may be either impressed or adhesive. A broker cannot recover his commission, unless the contract note is so stamped, or the stamp, if adhesive, is cancelled by him.

(*i*) *Ex parte Nichol*, 3 De G. & J. 387; 28 L. J., Chanc. 257.

(*j*) *Scott v. Dixon*, 29 L. J., Exch. 62, n.; *Felgate's Case*, 11 L. T., N. S. 613,—L. J.

(*k*) *Duncuft v. Albrecht*, 12 Sim. 199.

(*l*) *Ex parte Walton*, 26 L. J., Chanc. 545, 548.

(*m*) *Taylor v. Stray*, 26 L. J., C. P. 185, 287; *Birmingham v. Sheridan*, 33 L. J., Chanc. 57.

But when the shares are bought through a stock broker, the practice is for him to pay for the shares before that event, and he may recover the amount and stamps and commission from his employer, though the bank stops payment in the interval (*n*).

Transfer of Shares.—The 7 Geo. IV. c. 46 does not prescribe any form of transfer of shares. Shares in companies, established under the provisions of that statute, are transferable only according to the particular mode pointed out by the deeds of settlement (*o*). Shares in banking companies, formed under the 7 & 8 Vict. c. 113, are transferable by a deed duly stamped, and in a given form, as already shown (*p*). Shares in banking companies, formed or registered under the 20 & 21 Vict. c. 49, or the 21 & 22 Vict. c. 91, on registration under the Act of 1862, are transferable in the manner hitherto in use, or in such other manner as the companies may direct (*q*). But shares in limited banking companies, formed and registered under the Act of 1862, are transferable according to the regulations. The form universally prescribed is a deed attested by witnesses.

Members or Shareholders.—Let us next inquire who are meant by members or shareholders. With respect to banking companies, formed under articles of association, the Act of 1862 defines members to be the subscribers of the memorandum of association, and all persons who have agreed to become members and whose names are entered on the register of members (*r*). This register will be *primâ facie* evidence of membership (*s*). The register, though informal, is *primâ facie* evidence that a person whose name

(*n*) *Stray v. Russell*, El. & Bl. 888.

(*o*) *Bosanquet v. Shortridge*, 4 Exch. 699.

(*p*) *Ante*, p. 455.

(*q*) 25 & 26 Vict. c. 89, s. 178.

(*r*) *Id.* s. 23.

(*s*) *Id.* s. 37.

appears on it is a shareholder (*t*). The returns which banking companies in England and Wales are required to make, by the 8 & 9 Vict. c. 32, s. 21, annually to the stamp office of their members (*u*), will be also admissible in evidence to establish the fact. The articles of association generally provide that proof shall be furnished to the satisfaction of the directors of the title of persons claiming shares on death or bankruptcy or marriage of females. Until this proof is produced, a transfer cannot be made or enforced. In copartnerships, established under the 7 Geo. IV. c. 46, the deeds of settlement define the persons who are or may be shareholders, and prescribe certain modes and forms by which they are to become so. Therefore, where the deed requires that a transferee of shares shall be approved of by a board of directors, the approval certificate, although signed by a proper proportion of directors, is insufficient, if not given at a board, and the transferor still remains a shareholder (*x*).

Where the deed of settlement of the company requires certain acts to be done, by persons marrying female shareholders, and certain other acts to be done by executors of deceased shareholders, before they can respectively become members of the company, it is necessary that they should be shown to have performed the prescribed acts (*y*).

So, where by a deed of settlement every transferee of shares, who was not already a member of the company, was thereby to become a member of the company as to obligations, but not as to benefits, until he executed the deed of settlement; and a transferee of shares, who had previously executed the deed of settlement, was to become a member in respect of the transferred shares from the date of the transfer, without again executing the deed, and a purchaser of shares executed a deed, transferring from

(*t*) *Henderson v. Royal British Bank*, 26 L. J., Q. B. 112.

(*u*) See *ante*, p. 447.

(*x*) *Bosanquet v. Shortridge*, 4 Exch. 699.

(*y*) *Dodgson v. Bell*, 5 Exch. 967; *Ness v. Armstrong*, 4 Exch. 21; *Ness v. Bertram*, *id.* 195; *Ness v. Angas*, 3 Exch. 805.

the vendor to himself the shares, the purchaser thereby covenanting with the vendor, and with the public officer of the company, to pay all instalments, and to perform and keep all the covenants and stipulations of the deed of settlement, and, if required by the directors, to execute a deed of covenant to the trustees, or public officer, to observe all regulations affecting holders of shares in the company; still, it was held that the execution of this deed of transfer was not constructively, or in substance, an execution of the deed of settlement; and did not make him a member as to benefits (z).

The general principle, as established by numerous cases, is that where the deed of settlement prescribes certain formalities for effecting a transfer of shares, yet, notwithstanding the omission of these formalities, a transfer may be held binding, provided some act is done by or on behalf of the company, by which a transferee is recognized and treated as a shareholder instead of the transferor (a).

But where, by a deed of settlement and charter of a banking company, it was provided that, upon a transfer of shares taking place, seven days' previous notice in writing of the proposed transfer, should be given to the directors before any transfer could be made, and that, after the consent of the directors had been given, the transfer should be executed and delivered to the secretary to be registered, whereupon a new certificate, sealed with the seal of the company, was to be delivered to the transferee; and the company had departed from this form, and had allowed the practice to grow up for the secretary to deliver out a blank form of transfer without any previous notice, and when this was returned, after having been filled up and executed, it was laid before the court of directors, and on their giving their consent to the transfer, the transfer was registered in the proper book, and the registration

(z) *Hay v. Willoughby*, 10 Hare, 242.

(a) *Mayhew's Case*, 5 De G., Mac. & G. 837; *Gordon's Case*, 3 De G. & S. 249; *Maguire's Case*, 3 De G. & S. 31; *Watson v. Eales*, 26 L. J., Chanc. 361.

indorsed on the deed of transfer, and the seal affixed to the new certificate, which was delivered to the transferee; and certain shareholders had executed transfers of their shares, but the transfers had not been registered; it was considered that the practice above mentioned only operated to waive the seven days' notice, but not the consent of the directors, and that therefore these intended transferors were still shareholders (*b*).

Executors.—A. bequeathed to trustees all his personal estate upon trust to invest one moiety, and permit the dividends and profits to be received by his wife during widowhood. Part of this moiety was invested, in her name, in the purchase of shares in a banking copartnership. She died a widow and intestate. Administration was taken out by the surviving executor under her husband's will. B. afterwards requested the banking company to register the letters of administration in their books, and to transfer the shares and pay the dividends to him. This, however, the bankers refused to do, and, requiring the luxury, as was said, of judicial indemnity, became involved in a suit in Chancery, the result of which was, that they were obliged to do at last what they had at first refused to do, and also to pay the costs of the suit, the Master of the Rolls observing, bankers are not required to take notice of trusts; they may require an affidavit of the fact, under the 48 Geo. III. c. 149, ss. 35, 36, 37, but they are not to inquire whether the affidavit is true. They are to make the transfer, it seems, at all events (*c*).

The deed of settlement of a banking copartnership provided that the executor of a deceased shareholder should not be a member of the company in respect of his shares, but should be at liberty to sell them, or, at his option, to become a member on complying with certain terms, and that, if he did not become a member, he should not be entitled to any dividend in respect of such shares accruing

(*b*) *In re Royal British Bank*, 26 L. J., Chanc. 545.

(*c*) *Hennell v. Strong*, 25 L. J., Chanc. 407.

after the death of the testator; the executor, not having complied with the terms, was held not to be a member for the purpose of execution on a judgment against the public officer, although he had actually received a dividend which accrued due after the death (c).

By the 25 & 26 Vict. c. 89, s. 24, a transfer of a deceased member's share in a company formed under that act, made by his personal representative, is to be of the same validity as if he had been a member at the time.

Husband and Wife.—Precisely the same principle governs the case of the husband of a female shareholder, where the deed of settlement requires that he shall go through certain forms, or do acts, previously to becoming a member: then he is not a member if he has not done those acts (d); that is, the wife remains the member, notwithstanding her coverture.

Spiritual Persons.—With regard to persons who may be members of banking companies; the trade or business of banking, was held to be within the 57 Geo. III. c. 99, which restrained spiritual persons from being occupied in any trade or dealings, so that, if a bill of exchange were indorsed to a banking copartnership, and they sued upon it, by their public officer, to show that spiritual persons were partners and members of the company, defeated the action, and barred the company from recovering the amount of the bill, inasmuch as the copartnership was, in such case, carried on in violation of the above-mentioned statute.

The consequences were the same, in the case of any other bank, in which one of the members was a clergyman; even in the case where a clerical executor continued to carry on the business for the benefit of the testator's estate, as executor (e).

(c) *Ness v. Armstrong*, 4 Exch. 21.

(d) *Ness v. Angas*, 3 Exch. 805; *Dodgson v. Bell*, 5 Exch. 967.

(e) *Hall v. Franklin*, 3 M. & W. 259, 268. The 57 Geo. 3, c. 99, was repealed by 1 & 2 Vict. c. 106, s. 1, but the prohibition against clergymen trading is re-enacted by sect. 29.

The former of these results was deemed to be so inexpedient, that an act of parliament was immediately passed, to render contracts with these banking copartnerships valid, although there might be clergymen among the shareholders, or partners, by an act(*f*) which was shortly afterwards repealed, but was substantially re-enacted by a statute(*g*), by which clergymen, although they may be members, partners, or shareholders in these copartnerships, cannot be directors, or managers, or take part in person in the business. But the law remains the same with regard to the disability of clergymen being partners in private banks.

Bankruptcy.—Members of banking copartnerships cannot be proceeded against in bankruptcy, upon a debt due from the company, where no judgment has been obtained against the public officer, although the business has been relinquished, and an order has been made to wind up the company, prior to the proceedings in bankruptcy; and the same is the case, although there is not any public officer in existence (*h*). Neither can members of banking companies be made individually bankrupts merely by reason of the insolvency or winding-up of the companies.

Calls.—The deed of settlement constituting a banking company, and the articles of association, provide for the making of calls by the directors. The particular provisions in this respect should be strictly observed, or otherwise the calls may be invalid, and incapable of being enforced. It is a usual provision that shares cannot be transferred while the calls remain unpaid on the shares. Payment of a deposit on an application for shares, or an allotment, is not a call. A call cannot properly be made until shares have been allotted(*i*). A call made in pursuance of a deed of settlement of a banking company, under

(*f*) 1 Vict. c. 10.

(*g*) 4 Vict. c. 14.

(*h*) *Davison v. Farmer*, 6 Exch. 242.

(*i*) *Croskey v. Bank of Wales, Limited*, 4 Giff. 314; 9 Jur., N. S. 595.

the 7 Geo. IV. c. 46, is payable before the simple contract debts of a testator (*j*). So a call made on the shares of members of banking companies formed under the Companies Act of 1862, is in the nature of a specialty debt (*k*), and is payable before simple contract debts (*l*).

Where the deed of settlement of a banking company defined shareholder and member to mean the owner of a share or interest in the capital of the company, and provided that the shares should be transmissible to personal representatives, but that no executor should, as such, be a member, but that every executor might either sell his testator's shares, or constitute himself a member, in respect of them, by a mode pointed out by the deed, and that the directors might declare the shares forfeited, in case executors did not constitute themselves members, and the deed provided for the payment of calls by shareholders: and a transferee of shares, having covenanted in the transfer deed with the trustees of the company to perform the stipulations of the deed of settlement, died, and his executor took no step to become a member; in a suit in equity against the executor, it was held that the company was entitled to prove as creditors, in respect of a call made after the death; for, that under the provisions of the deed, executors were placed in the position of holders of shares in the company, although not having all the rights which belonged to an owner of shares (*m*).

Where shares were specifically bequeathed to infants, and were transferred into the names of executors, and several years afterwards a call was made, it was held that it must be paid by the legatees, and not out of the testator's residuary estate (*n*). The question whether a specific legatee of shares or the residuary estate is liable to calls

(*j*) *Henderson v. Gilchrist*, 17 Jur. 570.

(*k*) 25 & 26 Vict. c. 89, s. 16.

(*l*) *Ex parte Robinson*, 6 De G., Mac. & G. 572; 26 L. J., Chanc. 95.

(*m*) *Heward v. Wheatley*, 3 De G., Mac. & G. 628.

(*n*) *Armstrong v. Burnett*, 20 Beav. 424; 24 L. J., Chanc. 473.

depends upon whether the calls are actually made before the shareholder's death. A testatrix bequeathed shares in a banking company; before her death three calls were authorized at stated intervals, but she died before two of the periods; it was held, under the circumstances, and from the practice of the company, that the calls were not to be considered as really made, until a call letter had been sent to the shareholders, and as to those sent after her death, the specific legatee, and not the residuary legatee, must bear the calls (*o*). But it has been said (*p*), that the right principle is, that if any payments were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate; but if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee.

Charging Shares.—Shares in a banking copartnership are shares in a public company, chargeable by a judge's order, on a judgment being recovered against the proprietor of them, within the 14th section of the 1 & 2 Vict. c. 110, which empowers a judge at chambers to grant an order charging shares in public companies, whether incorporated or unincorporated, provided that no proceedings shall be taken, to have the benefit of such charge, until after the expiration of six calendar months from the date of the order. The effect of the charge is the same, as if the judgment debtor had himself charged the shares (*q*).

A clause in a deed of settlement, making the approbation of the directors necessary to a sale of shares, has no effect of itself to limit the assignability of shares; in practice, the shares are transferable (*r*) notwithstanding.

(*o*) *Adams v. Ferich*, 26 Beav. 384; 28 L. J., Chanc. 514.

(*p*) *Day v. Day*, 1 Drew. & Sm. 261; 29 L. J., Chanc. 466, *per* Kindersley, V.-C.

(*q*) 1 & 2 Vict. c. 110, s. 14; *per* Parke, B., *Graham v. Connell*, 19 L. J., Exch. 362.

(*r*) *Per* Parke, B., *Graham v. Connell*, 19 L. J., Exch. 362; see the clause, 1 Sim. (N. S.) 228.

Shares may be charged by a judge's order, under the 1 & 2 Vict. c. 110, s. 14, with a judgment debt; although the deed of settlement of the company provides, "that the shares should not be transferable, except by the consent of the directors:" and "that if any order or decree was made against any proprietor, by which his shares became charged, they should be forfeited to the company." This appears, from a case where the company was empowered to sue and be sued by a public officer, under the 7 & 8 Vict. c. 113, s. 47, and where the Court of Exchequer, holding it to be somewhat doubtful, whether the body was a "public company" within the meaning of the 1 & 2 Vict. c. 110, s. 14, refused to set aside the order, which had been made (*s*). However, the same company, the Union Bank of London, has since been held by Lord Cranworth, V.-C., to be a public company, within the 1 & 2 Vict. c. 110, s. 14 (*t*), and it may be considered to be clear, that shares in similarly constituted companies are chargeable.

Hence shares in all copartnerships, formed under the 7 Geo. IV. c. 46, are chargeable; for the 7 & 8 Vict. c. 113, s. 47, which is still in force (*u*), directs all judgments, orders and decrees to be enforced in like manner as is provided with respect to such companies carrying on business *beyond* sixty-five miles from London, and the shares of companies carrying on business *within* sixty-five miles from London have been decided to be chargeable, it is evident the others are so also; or, in other words, all shares in these bodies are chargeable. The registration of banking companies under the Act of 1862 (*x*), constitutes them as well public as incorporated companies, and consequently the shares of the proprietors will be chargeable under the 1 & 2 Vict. c. 110, s. 14.

(*s*) *Graham v. Connell*, 19 L. J., Exch. 364; 1 L., M. & P. 438.

(*t*) *M'Intyre v. Connell*, 1 Sim. (N. S.) 225; 20 L. J., Chanc. 284; 15 Jur. 529; see *Nicholls v. Rosewarne*, 6 C. B., N. S. 480.

(*u*) 25 & 26 Vict. c. 89, s. 205, Third Schedule, 2nd Part.

(*x*) *Id.* ss 18, 191.

Lien on Shares.—Where a deed of settlement of a banking copartnership provided, that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor; and a proprietor of shares became bankrupt, being largely indebted to the bank for advances; the shares were held not to pass to his assignees, as being in the reputed ownership of the bankrupt, so as to defeat the lien of the bank (*y*).

So, when the stipulation was, that the directors should have a lien on the shares and stock of every shareholder, for debts due from him to the company, and that the directors might cancel and declare forfeited, or sell, the shares of such shareholder, or otherwise deal with the same, as the case might require, for obtaining payment of such debts; the bank was considered to have a lien, not only on the shares, but also on the dividends, of a shareholder, who had overdrawn his account with them as a customer (*z*). By the articles of association, a banking company had a primary lien on the shares of its members for all moneys due to the company, and might refuse to register transfers whilst a shareholder was indebted to the company. The company discounted bills of exchange accepted by one of their shareholders, but the bills had not arrived at maturity when a transfer of his shares was presented for registration to the company; it was held, that there was an existing debt due to the company, though the remedy for its recovery was suspended until the bills were dishonoured, and that the company was justified in refusing to register the transfer (*a*).

A trustee invested part of a trust fund in the purchase of shares of a banking copartnership, he himself being also a shareholder in his own right: he afterwards made various

(*y*) *Ex parte Plant*, 4 Deac. & C. 160.

(*z*) *Hague v. Dandeson*, 2 Exch. 741.

(*a*) *In re London, Birmingham and South Staffordshire Banking Company (Limited)*, 13 W. R. 446.—Romilly, M.R.

sales and purchases in these shares of the company. There was no distinguishing mark by which the shares could be traced; they were in the nature of capital, expressed by quantity. The trustee agreed with the copartnership to assign to them some of the shares standing in his name, by way of security, for advances made by the bank to him; but no transfer was actually made. The bank had no actual notice that any of the shares were held on trust. The trustee afterwards became bankrupt: and it was held, that the bank had no lien on any of the shares which had been held in trust; and that, although the shares held in trust might have been changed, by selling and repurchasing, the trustee must still be considered as holding, for the purposes of the trust, the same number of the repurchased shares which stood in his name at the time of the bankruptcy (b).

Mortgaging.—A transfer, by way of mortgage, to secure a debt having been made of shares in a banking copartnership, the mortgagor afterwards paid off the debt and applied for a retransfer of the shares; but the directors did not permit the retransfer to be made. In the meantime, a creditor recovered judgment against their public officer, and threatened execution against the mortgagee, as a shareholder.

A Court of Equity held that where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed, binding the mortgagor to take a retransfer of the shares, the mortgagor was not liable to indemnify the mortgagee against debts incurred after the mortgage, and before the debt was paid off; but that the mortgagor having paid off the mortgage, and elected to take the retransfer of the shares, the mortgagee became a trustee of the shares for the mortgagor, and the mortgagor was bound to indemnify him against the liabilities, which he had properly incurred, by holding the shares (c).

(b) *Murray v. Pickett*, 12 Cl. & F. 764.

(c) *Phene v. Gillan*, 5 Hare. 1.

CHAPTER XXXIII.

DIRECTORS.

Qualification.—The number, amount, and tenure of shares, which qualify members for the office of directors, are determined by the articles of association, or deed of settlement of the company. These provisions do not necessarily apply to directors on the formation of the company (*a*). The holder of nominally paid-up shares cannot qualify as a director (*a*). Acting as a director of a banking company, will not render a party liable for the amount of shares which are necessary as a qualification for the office (*b*). Therefore where a director signed the memorandum of association for twenty-five shares, and also the articles of association by which fifty shares were declared to be the qualification of a director, and he afterwards acted as such; he was held liable as a contributory, on the insolvency of the company, for the twenty-five only and not for the fifty, as there was no separate or distinct agreement on his part to take that number (*a*).

Powers.—In inquiring as to the authority, powers, and liabilities of directors of a banking copartnership, in the first place, it will be proper to premise, that, in construing a deed of settlement or articles of association of one of these copartnerships, the court will, while collecting the extent of the authority intended to be conferred on the directors, construe it with reference to the nature of the business to be transacted, and the purposes contemplated, in order to judge what powers and authorities the law will

(*a*) *Ex parte Roney*, 33 L. J., Chanc. 731.

(*b*) *Ex parte Marquis of Abercorn*, 31 L. J., Chanc. 828.

imply from the nature of the office, and how far those powers and authorities are enlarged or restricted by any of the provisions of the instrument (*d*).

Where the deed of settlement of a banking company expressly invested the directors with full power and authority to superintend, order, conduct, regulate, and manage all and singular the affairs and business of the company, to the best of their discretion and judgment, and provided that the board of directors should, and lawfully might, from time to time, devise and make such provisions, rules, orders, and regulations, touching the government, carrying on, and management of the affairs of the company, the same not being repugnant to the general rules and regulations in the deed contained, as they should think expedient; and that the concern should continue for 100 years: it was held, that the directors had the powers of managing partners in an ordinary banking partnership, amongst which was the power of borrowing money for the purpose of discharging the existing liabilities of the bank, till the assets could be realized; and of discontinuing the bank, if they thought such a step essential to the interests of the shareholders; and that their having raised a loan which they had undertaken to repay, and accompanied the engagement with other stipulations, some of which were *ultra vires*, did not discharge the bank; the only effect being, that such stipulations could not be enforced (*e*).

But it seems hardly necessary to point out, that directors of a banking copartnership, whether with or without the consent of the majority of the shareholders, have no authority to convert their banking company into a company for different purposes; and that money borrowed for the purpose of effecting that transmutation, with notice on the part of the lender, will not constitute a debt of the company, for the recovery of which it can be sued (*f*).

(*d*) *Bank of Australasia v. Breillat*, 6 Moore P. C. 190; 12 Jur. 189.

(*e*) *Bank of Australasia v. Breillat*, 6 Moore P. C. 152.

(*f*) 6 Moore P. C. 197.

Nevertheless, directors may undoubtedly, at their discretion, either discontinue altogether the business of the concern, or restrict the business to certain portions of that in which it was originally intended the bank should employ its funds, if the directors think such steps essential to the interests of the shareholders. Such a power seems necessarily implied in the exclusive power of management; in the power of determining what transactions should be entered into, what notes issued, what deposits received, what bills discounted, or loans made.

The other hypothesis involves this difficulty, that, if the business could only be discontinued by a vote of the majority of the shareholders, then, unless a majority could be brought together in person, or by their attornies, the business, in the above instance, must have continued for 100 years,—it being a stipulation of the deed of settlement, and, indeed, the principal object of it, that such should be the duration of the banking establishment, and never, during that period, could have been terminated, except by bankruptcy or insolvency (*g*).

But, though directors may restrict, it does not seem that, even with the sanction of a majority of the members, they have the same power to extend, the business; *ex gratiâ*, if the copartnership were constituted to carry on banking business in England, they could not extend the business to India or the colonies (*h*). In articles of association, however, ample powers are now generally reserved to directors for establishing branch banks in defined localities, and extending agencies, as well as for amalgamating with other companies, and purchasing other businesses within the objects contemplated by the memorandum and articles of association (*i*).

But in articles of association, incorporating a banking company, the directors will not be authorized in changing

(*g*) 6 Moore P. C. 198.

(*h*) See 10 Hare, 54, 55, 61; 1 Collyer on Partnership, 379.

(*i*) See *Simpson v. Westminster Palace Hotel Company*, 10 H. L. Cas. 712.

materially the nature of the objects of the company as proposed in their prospectus (*k*).

The following case, in some degree, illustrates the question of the nature of the business that is within the scope of banking copartnerships :—

A deed of settlement of a banking copartnership provided that the directors should not be fewer than five, or more than seven ; that three, or more, should constitute a board, and be competent to transact all *ordinary business* ; that the directors should have power to compound for any debt owing to the company, and accede to and execute any deed of composition, or conveyance, or assignment of his estate or effects, made by any debtor of the company, whether a shareholder or not, for the benefit of his creditors, and to give time to any debtor for the payment of his debt, either upon or without security ; and to abandon any debt which might seem bad or desperate.

A. had purchased of the bank a colliery, of which they were mortgagees, for a sum, part of which he had paid in cash, and for the balance had accepted bills which had been renewed, and of which some were in circulation, and others overdue, in the hands of persons with whom they had been negotiated by the company. He was also largely indebted to the company on the balance of his account current. Afterwards the number of directors having become reduced to four, these four executed a deed, compounding the debt on the account current, and for the remainder of the purchase money, on payment of 1,000*l.* by A., and his agreeing to abandon the colliery to the bank ; the directors also covenanted “on behalf of the company, so far as they could lawfully bind the company, but not further or otherwise,” to indemnify A. against all such bills of exchange as had passed through the company’s hands.

A. brought an action for not indemnifying him, when it

(*k*) *In re Scottish and Universal Finance Bank (Limited)*, *Ship’s case*, 13 W. R. 450.—Wood, V.-C.

was held that the covenant did not bind the copartnership; for that this was not *ordinary business*; and no smaller number than five directors were competent to transact it; and it was made a question whether a board of three directors could transact even ordinary business, unless it was a board of three out of five directors (*l*).

Contracts.—Banking companies incorporated under the Act of 1862, whether as limited or as unlimited companies, are legally bound only by contracts made by deed under their common seal (*m*). Directors of a joint stock company, incorporated, enter into a contract, under the common seal of the company, exceeding their authority in so doing. This of itself does not, it has been said, avoid the contract; it must further be shown, in order to do this, that the contracting parties, when they contracted, were aware of the fact, and aware also, that the contract would be prejudicial to the interests of the shareholders; and the obligees of the bond, a banking company, recovered upon it (*n*).

This decision lays down a principle which it is important for all bankers to be aware of; it is mentioned here because it is in cases of joint stock banking companies, that transactions of this kind, viz., loans or advances of money to a corporation upon its bond, experience shows most commonly occur.

On the other hand, all persons dealing with banking companies must take notice—they are bound to be aware—of the limitations imposed by the deed of settlement, or by any statute, upon the directors as regards their powers; but not bound to more than to be aware of these limitations; they are not bound to draw any but direct or obvious inferences from the provisions they find there (*n*).

(*l*) *Kirk v. Bell*, 16 Q. B. 290.

(*m*) *M'Ardle v. Irish Iodine Company*, 15 Ir. Com. Law Rep. 146.

(*n*) *Royal British Bank v. Turquand*, 24 L. J., Q. B. 327; 5 El. & Bl. 240; affirmed on appeal, 25 L. J., Q. B. 317; 6 El. & Bl. 327.

The deed of settlement of a banking company empowered the directors to pay and allow to the servants of the company such remuneration, salaries and wages, as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company. The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon to pay him 1,000*l.* a year for three years, such contract was to be confirmed by the proprietary, or a board duly authorized; and it was held, that the directors alone had the power to confirm the contract by deed (*o*).

Notice to, affecting Company.—The operation of the acts of parliament, relating to copartnerships, established under the 7 Geo. IV. c. 46, is such as to render them *quasi* corporations to this extent, that notice to one of the members, or even to one of the directors, provided he has, by the constitution of the company, no share or control in the management of the accounts of the company, is not notice to the company (*p*). So knowledge of a particular fact relating to the accounts by one director of a banking company, is not notice to the company, where that director has no voice in the management of the accounts, and the money transactions of the company are conducted exclusively by a manager under three directors, of whom the director possessing the knowledge is not one (*q*).

Binding Shareholders by Bills, Notes, or Debentures.—The power of directors to bind the shareholders in unincorporated banking companies depends, in a great measure, upon the terms of the deeds of settlement, and the par-

(*o*) *Wilkins v. Roebuck*, 4 Drew. 281.

(*p*) *Powles v. Page*, 3 C. B. 25; 15 L. J., C. P. 217.

(*q*) *In re Carew*, 31 Beav. 39.

ticular form of the instruments. The directors of the Royal Bank of Australia, which was an unincorporated bank, established under a deed of settlement in 1840, issued promissory notes in this form:—

“ London, 1st August, 1846.

£200.

The Royal Bank.

We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company, jointly and severally promise to pay to Mr. G. H. Wray, or bearer, on the 1st of August, 1851, at the Union Bank of London the sum of two hundred pounds for value received on account of the company.”

This was signed thus:—

“ A. B., Chairman,
C. D., } Directors,
E. F., }

Of Australia.”

This form of note, although *ultra vires* the directors, as seeking to bind the shareholders severally, and therefore in that respect void; yet it being assumed that the directors were authorized to sign promissory notes, on behalf of the company, it was held to be binding on the company, as it sufficiently showed an intention to do so (*r*).

The decision in this case does not however conflict with the proposition stated on the highest authority (*s*), that in banking copartnerships directors, as such, have power to borrow money, for the *ordinary* purposes of the banking business, so as to bind the partnership, unless the power is expressly excluded by the terms of the deed.

By a deed of settlement of a banking copartnership established in India, it was provided that the business of the company should consist in issuing promissory notes payable to bearer on demand, discounting bills and promissory notes, and lending money on the security of personal property or of cash accounts. It was also provided, that no promissory notes or bills of exchange should be issued, nor bills or notes discounted, nor money lent, otherwise than of the description and in the manner above mentioned; it was held, that the directors had power to bind the share-

(*r*) *Maclae v. Sutherland*, 3 E. & B. 1; 23 L. J., Q. B. 229.

(*s*) *Bank of Australasia v. Breillat*, 6 Moore P. C. 194.

holders by issuing bank post bills, which are instruments of an ordinary and usual character in banking business (*t*).

The Royal Bank of Australia stopped payment in 1848; in an action (which came on to be tried in 1852), by the holder, on certain notes in the above form (*u*), which were at five years' date, and attached to each and on the same paper were coupons for half-yearly interest, at the rate of 5*l.* per cent. till the principal became due, and which had been issued, through a broker, employed by the directors, and for which the plaintiff had paid the full value, and sought to recover from certain of the directors the amount;—it was held (on a special case, stating these facts, and also that in the advice notes, from the broker to the plaintiff, the transaction was called a "Sale of Debentures;" that the documents appeared sometimes to have been called by the company's agent "Deposit notes;" and that the money raised by means of these notes was employed as capital, in starting branches of the bank in the colonies;)—that the real nature of the transaction was, in substance, a loan to the bank, on the security of the notes; and, *assuming that the directors had authority to contract such loan on behalf of the company*, it might be recovered, by the plaintiff, against the shareholders, as money lent; but that the transaction was so much out of the *ordinary* course of banking business, that authority to bind the partnership could not be ascribed to the directors *as such*; an express authority would be necessary; their implied authority to do all that was in the ordinary course of banking business would not suffice to establish their power to bind the partnership in this mode; the deed of settlement, however, was considered to have given authority to set up branch banks in the colonies, and to borrow money for that purpose in the mode adopted; and the shareholders, it was also held, must be taken to have ratified what had been

(*t*) *Forbes v. Marshall*, 11 Exch. 166; 24 L. J., Exch. 305.

(*u*) See *supra*, p. 511.

done, it appearing to the court, as a fact, that at successive annual meetings of the shareholders it was known that the capital, for this purpose, had been borrowed.

The same deed of settlement provided that the trade of the company should be that of banking, including the issuing of bank notes and bills, payable on demand after sight, after date or otherwise, and the making of loans and advances to customers, and other persons, on real or personal security, on sheep, cattle, &c., and on every other kind of property whatsoever, including the discount of bills of exchange, the borrowing or taking up money at interest on inland or foreign bills of exchange, or promissory notes, bonds, debentures, deposit receipts, or other obligations, as should from time to time be deemed expedient. Large discretionary powers were also given to the directors to invest, convert, reinvest, and vary the property, funds, &c., of the company.

The capital of the company was to consist of 1,000,000*l.*, and to be raised by 20,000 shares of 50*l.* each.

A large proportion of the shares allotted was taken by the directors themselves; but of the calls made upon these shares, little or nothing was ever paid by the directors.

In addition to the funds raised by the allotment of shares to other persons, the directors borrowed large sums of money upon debentures, or notes, in the form already stated.

The monies thus raised were in part drawn out, and in part sent out to one of the directors, who, under powers of attorney, and a commission, from his co-directors, had gone out to Australia, and there entered into large agricultural and other speculations, instead of employing the monies in the banking business.

The company suspended payment, and on winding up its affairs, claims by the holders of these instruments were held to be rightly admitted as debts against the company; for that the powers given by the deed were large enough

to authorize the directors to borrow money on such instruments, and that the notes were so framed as to be binding on the company (*v*). The legal right to prove upon the bankruptcy of the bank was held to be in the holders of these debentures (*x*).

Appropriating Shares.—A transaction entered into by directors, as the appropriation to themselves of shares, may be incapable of being sustained, having regard to the provisions of the deed of settlement, or the principles of equity governing the administration of trusts, as a transaction binding on the company, unless brought before the shareholders, and confirmed by them; yet, nevertheless, the directors, by the transaction, although not confirmed, may be bound, as between themselves and the company, notwithstanding the irregular nature of it.

Thus, a director in a banking copartnership had regularly, before 1840, become owner of twenty shares, which number of shares each director was, by the deed of settlement, obliged to hold, as a qualification for the office. The deed of settlement provided, that the shares of the company should be vested in the court of directors, who should have full power to allot, *appropriate*, reserve for, or dispose of the same, to such parties, and upon such terms, and in such manner, as they might think fit: and that the executor of any proprietor should not, as such, be a proprietor in respect of such shares, but he should be at liberty to dispose of them; or the company might, upon an executor giving notice, and complying with the provisions of the deed, permit him to become the proprietor, and personally chargeable.

The directors, on the 7th of August, 1840, resolved, without the privity of the shareholders, to appropriate to themselves a certain amount of additional shares—or, as

(*v*) *Walker's Case*, 18 Jur. 885.

(*x*) *Ex parte Boyd*, 26 L. J., Chanc. 739.

they called them, "credit shares"—for which they were severally to pay, by giving their promissory notes, payable to the trustees of the bank, for the amount for which each subscribed.

A director agreed to take (and he gave a promissory note in payment for) one hundred of these shares; he also signed a letter binding himself to pay the deposit and calls on them, but did not execute the deed of settlement in respect of them. He died in 1848, eight years after the giving the promissory note, never having paid any interest on, or any part of the principal of, the promissory note; in the books of the company, however, credit was given to him in respect of dividends on the credit shares, and he was charged with interest on the promissory note.

His executor was held to be rightly placed on the list of contributories, not only in respect of the twenty shares, but also in respect of the one hundred "credit shares," although the creation of the "credit shares" was not warranted by the deed, nor were they, in fact, ever issued or allotted.

The directors, it was said, "clearly were not entitled to allot to themselves a very large proportion of the capital of the company without bringing in a single shilling in aid of that capital, only giving promissory notes, payable at some distant period, debiting themselves with interest, as it became payable on their several notes, and taking credit for the dividends, to which they would properly have been entitled, if they had actually made the payments" (y).

In another case, which arose under the same deed of settlement, a director was regularly owner of twenty shares; he, subsequently, in pursuance of the resolution of the court of directors, took five hundred of the credit shares and gave his promissory note, payable in five years, for the amount; he also signed a letter binding himself to pay the deposit and the calls, but did not execute the deed of

(y) *Robinson, Ex parte*, 2 De G., Mac. & G. 517, 520.

settlement in respect of the five hundred shares. Three months after this he died. Within one month of his death his executors applied to the directors to ascertain the extent of his interest in, or liability to, the company. In answer they were informed, on behalf of the directors, that their testator held twenty shares. These were, thereupon, duly transferred to a purchaser, and the directors afterwards cancelled the five hundred shares, and the promissory note for the amount.

Eight years after the death of the testator, it was held that the executors ought not to be placed upon the list of contributories, for, although his estate might have been bound, if the claim has been promptly asserted, at the instance of the shareholders, yet, that so long after the distribution of his assets, the loss arising from the misrepresentation of the directors must fall upon themselves and the company, and not upon the estate (*y*).

The same deed of settlement further provided and required that the capital of the company should be one million sterling, divided into 20,000 shares of 50*l.* each, and that the proprietor of each share should bring in and pay to the company the full sum of 50*l.* in respect of such share, as and when called upon so to do, in manner thereafter (*i. e.* in the deed of settlement) provided. The court, therefore, gathered the intention of the parties to the deed to be "that all the shares should be actually *bonâ fide* subscribed for as upon money payments, no doubt depending upon the periods when the directors should think it right to make calls (*z*).

The clause that the directors were to appropriate or reserve shares, the court thought might be considered, perhaps, as giving power to the directors "to appropriate or reserve," not in terms, but in substance, *for themselves and their friends*, the whole of the shares; the words are, "to such parties, and upon such terms as they shall think

(*y*) *Meux's Case*, 2 De G., Mac. & G. 522.

(*z*) 2 De G., Mac. & G. 529.

fit," which rather looked as if they were to deal with third parties; but, whoever might take them, the shares could only be taken, subject to a general liability to pay for them, as a money transaction, although the payment was to be deferred, in the shape of calls, till wanted (a).

The whole amount of the "credit shares" taken by the directors formed an enormous sum in the aggregate, and a very large proportion of the entire capital mentioned in the deed of settlement.

When, therefore, shareholders execute deeds of settlement, or articles of association, giving "full power to the court of directors to allot, appropriate, reserve for, or dispose of, the shares, to such parties, and upon such terms, and in such manner as they may think fit;" the measure is one, which the shareholders ought to be fully impressed with the importance of, conferring, as it seems to do, so vast a power upon the body of directors.

Notwithstanding, however, that the deed conferred such large powers, the court treated the conduct of the directors as a fraud upon the general body of the shareholders; for the directors were aware, that without the aid of the fictitious capital represented by these "credit shares," there was no other way, in which it was possible for the concern, to have gone on.

If, for instance, at the first meeting of the shareholders, the directors had only represented the capital which was actually paid up, this company, it is clear, must have stopped at once, and that, in that case, the directors would have lost all their power and fancied benefit.

If a sale of shares by members of a company to the directors on behalf of the company is sanctioned by a majority at a general meeting, even assuming that the transaction to be *ultra vires* or improper, an acquiescence of six years on the part of the dissentient shareholders will preclude them from impeaching it (b).

(a) 2 De G., Mac. & G. 529.

(b) *Gregory v. Patchett*, 10 Jur., N. S. 1118.

Approval of Transfer of Shares.—The distinction between a banking copartnership, and an ordinary trading partnership, consists in the power and privilege which, by the provisions of the deed of settlement of the former, are given to a proprietor to retire and withdraw his capital from the concern, without a dissolution of the partnership, by transferring his shares. This power and privilege constitute very many inducements to the investment of capital in such concerns, and thereby enable the society, or partnership, to raise a capital and carry on transactions, which it would be impracticable to raise, or carry on, upon the basis of an ordinary mercantile partnership. The consequences which, as between a shareholder and the company, arise, by operation of law alone, upon a transfer of shares cannot, therefore, be inferred, from those which attach upon the dissolution of an ordinary partnership. The consequences arising upon a transfer of shares must be sought for in the provisions of the deed of settlement, or in some rule of law not repugnant to those provisions.

As directors cannot sell their right, as given by the deed of settlement, of objecting, on behalf of the company, to any proposed transfer of shares, so they cannot exercise the right of giving their sanction to such proposed transfer, for the purpose, and upon the condition, of obtaining payment of a debt already due to the company from the intended transferor of the shares (*b*).

Where articles of association prescribe that the company may decline to register any transfer of shares whilst a shareholder is indebted to the company, or unless the transferee is approved of by the directors, the directors are not warranted in arbitrarily refusing to register the transfer, if the shareholder is not in point of fact indebted to the company (*c*).

A deed of settlement of a banking copartnership declared, that no transfer of shares should be permitted, except upon notice to the directors, and, on the consent of a board of

(*b*) *Pinkett v. Wright*, 2 Hare, 120.

(*c*) 13 W. R. 446, *per Romilly*, M. R.

directors, such consent being signified by a certificate, in writing, signed by three directors, at the least; if such consent were refused, the shareholder might require the directors to buy his shares at the market price of the day. After a consent given, the name of the transferee was entered in the share register book, and the entry there was conclusive against him.

A., a shareholder, proceeded to transfer his shares to different persons, and sent the proper notices to the directors; received back consents, signed by three directors; and completed the transfers; the transferees' names were entered in the share register book; and, in the return made to the Inland Revenue, the name of A. was omitted from the list of shareholders, and inserted in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings of shareholders.

The directors, subsequently, sought to impeach these transfers, on the ground of the notices never having been submitted to a *board of directors*, nor the consents given by a *board of directors*, as required by the deed, but that the consents had been signed by the managing director, and then signed by two other directors. This appeared to have been the mode of transacting this description of business ever since the formation of the company.

The House of Lords decided, that the directors could not set up their own want of observance of the formalities required by the deed, as a ground on which to fix A. with liability, as continuing to be a shareholder, for that they were bound by their course of dealing (*d*).

It is to be observed, that, on the same facts (except that the register was excluded), a court of law had previously held A. to remain a shareholder, as to creditors of the bank, as there was no consent by a board of directors, and, considering that the irregular mode of transfer,

(*d*) *Bargate v. Shortridge*, 5 H. L. Cas. 297.

though adopted for some years, was wholly ineffectual, and, consequently, that A. remained a shareholder, as to creditors of the banking copartnership (e).

The question before the House of Lords, however, was, whether the directors could take advantage of their own laches to comply with the requirements of the deed of settlement, and treat A. as a member, when, but for their own conduct, there would have been no pretence for doing so.

A deed of settlement of a banking company provided that shares might be transferred, with the consent of the directors, but that the transfers should be registered, and that an indorsement of the registration should be made on the deed of transfer, and should be sufficient evidence of the consent of the directors (f). A shareholder placed his shares in the hands of a broker, and they were sold nominally to the solicitor of the company, but really (though without the knowledge of the shareholder) to the company itself, the purchase money being paid out of the funds of the company, and the subsequent dividends being carried to their credit, it was held that, although there was no indorsement on the transfer to the solicitor, the directors' consent was sufficiently proved, and that on the company being wound up, the vendor ought not to be placed on the list of contributories as a shareholder.

A shareholder executed a transfer of his shares which he took, together with the certificate to the company's office for registration. He left the transfer, but refused to leave the certificate for the inspection of the directors: it was held, that the court would not, under the 25 & 26 Vict. c. 89, s. 35, compel the company to register the transfer, as the directors were legally entitled to satisfy themselves of the validity of the certificate (g).

Enhancing Price of Shares.—One of the directors of a banking copartnership established at Calcutta, prevailed

(e) *Bosanquet v. Shortridge*, 4 Exch. 699.

(f) *Nicol's Case*, 3 De G. & J. 387.

(g) 33 Beav. 119.

upon several persons to join him for the purpose of buying shares of the bank ; they applied to the bank for a credit, on their joint and several securities, to be opened for the purpose of purchasing these shares ; this was granted by the directors ; the account was operated on, by drawing on it for the payment of the shares, when bought, and paying into it, when money was raised on the shares, and elsewhere ; a total loss ensued, the bank failed, the director, with the parties who had joined him in the speculation, being debtors to the bank to a large amount. In this case the deed of settlement expressly prohibited loans being made without security ; here the advances had been made with no security, in the sense of the deed : the transaction of the opening the credit was, therefore, a breach of trust, in one and all the directors concerned, and a breach of trust of no ordinary importance, because it was manifest, that such a prohibition must constitute the chief safeguard for the shareholders, that their capital should not be perilled. As the purpose for which the money was so to be lent to these persons, was to be applied for the purchase of the bank shares, at a certain price,—it was intended, clearly, to raise the price of the bank shares out of the monies of the bank itself,—to create for these shares a false demand, the end being to deceive the shareholders and the public. Now, no circumstances of embarrassment, no difficulty, can excuse portraying, in false and delusive colours, the condition of the affairs of the bank entrusted to the charge of the directors ; no hope of saving a falling company can justify a violation of the deed, by misappropriating the funds committed to their care in such manner (*h*).

Directors representing, with the intent to raise the shares of the company in price, in their reports, and by their agents, that the affairs of the company are in a very prosperous state, and declaring large dividends, at a time

(*h*) *In re Grant*, 7 Moore P. C. 141.

when those affairs are greatly embarrassed, and thereby inducing a person to purchase shares, may be made criminally responsible for their conduct (*i*).

So if directors issue false and fraudulent reports to the public, and the officers of the bank supply detailed statements for such reports, knowing that they are to be used for purposes of deceit, and a third person acting on such reports buys shares in the company and sustains loss thereby, all assisting in the fraud are personally liable to the purchaser, though the report was signed only by the directors (*k*).

The criminal liability of directors and officers for issuing false reports and balance sheets will be considered in a subsequent chapter.

Cancelling Shares in order to relieve from Liability.—Generally, directors have no power to cancel shares. Even where the deed of settlement provides that in all cases, not provided for by that or any other supplemental deed of settlement, the directors may act in such manner as to promote the interests and welfare of the company: this does not enable them to cancel a retiring director's shares, so as to exempt him from liability (*l*).

The directors of a banking company passed a resolution that the shares of one of them, who was desirous of retiring, should be taken by the company at par, and that a release and an indemnity might be arranged with the solicitors of the parties. Upon the footing of this resolution the director retired, and, after his retirement, debts were contracted, and ultimately the company was wound up. The director was placed upon the list of contributors, the resolution not being considered to be binding on the company: it was held, that the part of the resolution as to indemnity depended on the validity of the retirement, and that a co-director, who had not been

(*i*) *Burnes v. Pennell*, 2 H. L. Cas. 497, 509.

(*k*) *Cullen v. Thompson*, 4 Macq. H. L. Cas. 431; 9 Jur., N. S. 85.

(*l*) *Stanhope's Case*, 3 De G. & S. 198.

present when the resolution was passed, but continued to be a director afterwards, was not precluded by it from calling on the retired director to contribute to the repayment of what the other director had overpaid beyond his share in respect of the debts contracted after the date of the resolution (*m*).

But where a deed of settlement provided, that the directors should have power to enter into any contract with any persons, respecting any matter in which the company might be interested, and afterwards to release and discharge, or modify and vary the terms of any such contract, and to compromise, compound, and settle any action, suit, claim, or demand, in which the company may be interested, upon such terms, and in such manner, as the court of directors might think proper. The deed also empowered the court of directors to purchase, for the use of the company, any shares in the company; the shares which should be so purchased to be considered part of the property and effects of the company, and be held and applied accordingly.

These terms were held to authorize the court of directors to accept the resignation of one of their own body; and afterwards to release him from his shares which he had taken, and to hand back to him a promissory note, which he had given in respect of those shares; the resignation of the office of director and the relinquishment of the shares being distinct acts, the latter, subsequent to the former, and there being no suggestion of fraud, or of the company having been in failing circumstances at the time.

In many cases the deeds of settlement do not give powers to the directors to authorize the retirement of a body of the shareholders, so that an agreement entered into by the directors with such members, that on the payment by them of a sum of money, in discharge of all their liabilities, they should be allowed to retire, transferring their shares to two persons named by the directors—in

(*m*) *Walker's Case, In re St. Marylebone Joint Stock Banking Company*, 8 De G., Mac. & G. 607; 26 L. J., Chanc. 263.

fact, two of their own body—will be wholly *ultra vires* the directors, and cannot be supported ; and the shareholders, notwithstanding, will remain liable for the debts of the company (n).

Forfeiting Shares.—A power to forfeit shares must be expressly conferred by the deed of settlement or articles of association, it cannot be implied or inferred. By a clause in a deed of settlement, it was provided that if a proprietor became indebted to the company in respect of cash advances or otherwise, the directors might cancel and declare forfeited, or sell, his shares, either wholly or in part, as the case might require, towards the liquidation of such debt, and such person should thenceforth cease to be a proprietor. A holder of 1,000 shares being indebted to the bank for cash advances, a notice was given to him that unless he redeemed the 1,000 shares by payment of the balance of his account within fourteen days, the directors would on that day cancel and declare his shares forfeited, and would place the value of the shares on that day to the credit of his account. The balance not having been paid, the directors passed a resolution declaring the shares to be cancelled and forfeited. The value of the shares on that day was considered by them to be 10,000*l.*, and it was resolved that credit should be given to the proprietor for that amount in his account. He afterwards filed a bill to set aside the cancellation. The market price of the shares on the day of the resolution, slightly exceeded that allowed by the directors, although if the shares had been carried into the market, the price would have been reduced greatly below that amount. A court of equity decided that the directors having placed themselves in the position both of vendors and purchasers were bound to allow the highest market price, which could be obtained for the shares without speculating upon what might have been the effect of

(n) *Ex parte Bennett*, 24 L. J., Chanc. 130.

throwing the 1,000 shares into the market, and the cancellation was declared to be void (o). The subscription contract of a projected banking company, after reciting that the capital was agreed to consist of 1,000,000*l.*, with power to increase it to 3,000,000*l.*, and that application had been made to the crown for a charter, nominated certain persons to be directors, until the charter should be obtained, with power for them to regulate the terms of the charter, in such manner as they should think necessary, in compliance with the regulations of the government, and to narrow or extend the objects of the company, as might be necessary for that purpose.

The directors were also empowered, as soon as the charter was sealed, to prepare a deed of settlement, to call for a first instalment from the subscribers, and to declare forfeited the shares of any subscribers who did not execute such deed of settlement.

The charter that was obtained incorporated the company, with a capital of 644,000*l.*, and power to increase it to 1,000,000*l.*, with the consent of the Lords of the Treasury.

A call was afterwards made, and a deed of settlement prepared, which recited the charter, the call and its payment, by the parties to the deed.

It was decided (p) that the power of the directors was not terminated on the grant of the charter; that the charter was not inconsistent with the subscription contract, and that the call was properly made; but that as the deed of settlement made recital of the payment of the call, and the power to forfeit shares subsisted only for non-execution of the deed of settlement, therefore the directors had no power to forfeit for non-execution of the deed.

Declaring Dividends.—The payment of dividends, derived from other sources than the profits of the company, is a fraud on the part of the directors; for dividends are

(o) *Stubbs v. Lister*, 1 Y. & C. N. C. C. 81.

(p) *Norman v. Mitchell*, 5 De G., Mac. & G. 648.

supposed to be paid out of the profits only, and when directors order a dividend to any given amount, they, without expressly saying so, yet, impliedly, do declare to the world that the company has made profits, which justify such a dividend. This is a gross fraud, for which they are liable to be punished.

In case any one, in consequence of *such implied misrepresentations*, buys shares, and, it appearing, that the concern is failing, he is injured, he may proceed against the directors by action; they are liable, also, to be indicted in such case: even if no one can be shown to have been injured, as a matter of strict law, they are liable to an indictment for a conspiracy (q).

But this alone would not be sufficient to enable the party to set aside the contract as against the directors; it is not enough for him to say, “unless you had, by paying dividends, thereby making the public believe you were paying them out of profits, given this flourishing appearance to the concern by your own acts and deeds, I should never have bought my shares:” such a general averment of fraud is not enough; it must be *dolus dans locum contractui* (r).

A bill was filed in equity by a shareholder against directors of a banking company to restrain them from paying a dividend already declared, and from declaring or paying any future dividends, except out of the profits of the bank, but the other shareholders were not before the court. The court granted an injunction as to future dividends, but refused to restrain the payment of the dividend that had been declared, on the ground that the declaration of the dividend gave the shareholders a legal right to the payment of that dividend, and the court would not, in the absence of a representation by all the shareholders, interfere with that right (s).

(q) *Burnes v. Pennell*, 2 H. L. Cas. 524, 525.

(r) *Id.* 530.

(s) *Fawcett v. Laurie*, 1 Drew. & Sm. 192.

CHAPTER XXXIV.

MANAGER.

BANKING copartnerships and companies, where their business is extensive, or branches are established, appoint managers. In deeds of settlement of joint stock banks, formed under the 7 & 8 Vict. c. 113, a specific provision, as to the appointment of a manager, or other officer to perform the duties of a manager, was necessary (*a*). That statute required the manager to make out, verify, and deliver, to the stamp office, the annual returns of the title of the company, the names and places of abodes of the members, directors, and managers, and the names and places of the local banks established by the principal bank (*b*). Legal proceedings and notices may be served upon him (*c*). The duties imposed by this statute upon managers of joint stock banks formed under its provisions, and still in operation, must be continued to be discharged by them. The subsequent acts regulating the formation of banking companies do not specifically require the appointment of managers. But when these companies appoint managers, then the penalties which the Act of 1862 imposes upon managers of limited banking companies, omitting or neglecting to affix the name of their company on the outside of its several places of business and branches, to sign instruments, official documents, and notices with the seal of the company, to publish the statements of its capital, assets, and liabilities (*d*), to notify to

(*a*) Sect. 4, and ante, 459.

(*b*) *Id.* ss. 16, 17, 18.

(*c*) *Id.* s. 43.

(*d*) Ante, 478.

the registrar every increase of the capital of the company (*f*), to keep the register of its members (*g*), to make out and forward to the registrar the annual list of its members and summary of particulars (*g*), as required by that act, or refusing an inspection of the register (*h*), will be incurred by the managers. It will be their office to attend to the proper discharge of these duties.

A manager may carry on a separate business, as a merchant or otherwise, by the permission of the company, which, however, is unusual; but by his so doing, he is not entitled to grant himself the same accommodation, in respect of his separate trade, which he might obtain from an independent banker. It would be necessary for him, in order to sustain such a proceeding, to show that he had brought the whole circumstances most fully and fairly before the directors; it would not be enough to show merely that he had not concealed any thing; such a proceeding, if the whole had been brought before the directors, and had been assented to by them, might be permitted to stand, but only in that case (*i*).

A manager of a banking copartnership then has no right to grant himself accommodation out of the funds of the bank, without the consent of the directors, given with a full knowledge of all the circumstances. This, however, though it will prevent the company from repudiating the transaction, will, in many cases, as of course, fail to save them from loss.

Thus, where A. was a manager of a branch bank, and also the executor of a testatrix, who had lent 1,500*l.* on the security of a ship. A. afterwards shifted the security from this ship to another ship, and in his character of executor borrowed 1,600*l.*, from the bank, and also lent it to the owner of the latter ship, and took a mortgage of that

(*f*) Ante, 474.

(*g*) Ante, 475.

(*h*) Ante, 477.

(*i*) *Gwatkin v. Campbell*, 1 Jur. (N. S.) Chanc. 131.

ship, for the 1,500*l.* lent by the testatrix, and also for the 1,600*l.*, which he had lent as executor. As security for the money lent to him by the bank, he, several months after the advance by the bank, assigned to them this mortgage, and the mortgage debts. The last-mentioned ship was sold for 1,150*l.*, and, in a suit by the residuary legatees of the testatrix against A. and the bank for the recovery of this sum, the executor, it was held, had no right to pledge the assets; but as the executor was also agent of the bank, the bank must be considered as having notice of his inability to pledge the assets, and could stand in no better position than he did, but the legatees were entitled, in preference to the bank, to the 1,150*l.*, and the bank having, in fact, already received this 1,150*l.*, were charged with interest on it at 4*l.* per cent., during the period since they had received it, to the day of the final decree (*j*).

A manager of a banking copartnership, which stopped payment in January, 1846, indorsed a bill of exchange, dated London, May 14, 1846, in this way—

“*Per proc.* Newcastle-upon-Tyne Joint Stock Banking Company, H. Bleckley, Manager.”

The plaintiff proved that he was holder of the bill for value, having received it from the drawer, who had drawn the bill, it was suggested, for his own accommodation, and had indorsed it to Bleckley, who had indorsed it as above, then redelivered it to the drawer. The action was against the public officer of the above-named company. It was contended that the manager's authority to indorse was at an end on the stoppage of the bank, but the court dealt with the case as if the bank had not suspended payment. Other bills were produced, indorsed in the same way, one before and the other after the bank had stopped,

(*j*) *Collinson v. Lister*, 25 L. J., Chanc. 38; 20 Beav. 356; 7 De G., Mac. & G. 634. As to a manager suing for per centage or commission against the company, see *Law v. Thompson*, 15 M. & W. 541.

upon which actions had also been brought, and which had been paid by the bank.

The court considered the evidence to establish that every bill that was accepted or indorsed by Bleckley, the manager, was accepted or indorsed by *procuratio*n; the legal effect of which is, an express intimation to every one, that the acceptance or indorsement was made under a special or limited authority, binding every one, therefore, to ascertain, before he takes such a bill, that the indorsement is agreeable to the authority given, according to a well-known rule respecting all such acceptances or indorsements. A party taking such a bill, therefore, without inquiry, if it turns out that the manager accepting or indorsing exceeded his authority, he must suffer for his temerity; and the jury found that the manager had not authority to indorse in this case; the bank had a verdict, which was upheld by the court (*k*).

So where a bill of exchange was accepted "*per proc.* the Tipperary Joint Stock Bank, W. Kelly, manager," and in an action on the bill against the bank, the judge at the trial having told the jury that if they believed that Kelly, as manager of the bank, signed the bill by direction of one of the acting directors, the acceptance was binding on the bank, it was held, that having regard to the fact that the bill was accepted *per procuratio*n, and that the deed of partnership of the bank required *three* directors to form a court, and empowered the court of directors to make regulations respecting the accepting of bills, that the ruling was wrong (*l*).

It is customary with many banking companies to communicate, by circular to their agents and correspondents, the fact of the appointment of their manager, and his authority to sign drafts on their account, with a specimen of his handwriting.

(*k*) *Alexander v. Mackenzie*, 6 C. B. 766; *Stagg v. Elliott*, 12 C. B., N. S. 373, 31 L. J., C. P. 260; *per proc.* usually implies authorization by power of attorney.

(*l*) *Eyre v. M'Dowell*, 14 Com. Ir. Law Rep. 314.

A promissory note, to secure an account at a branch bank at Birmingham, of a banking copartnership, called the National Provincial Bank of England, was given in this form :—

£1,000.

Birmingham, March 24, 1836.

Three months after date we promise to pay to the Manager of the National Provincial Bank of England the sum of One thousand pounds.

A. B.

C. D.

E. F.

At the time the National Provincial Bank of England carried on business, as well in other places as in Birmingham, by means of branch banks, but having a general board of management at London, under a board of directors, at which Robertson was manager. Elrich was the local manager at Birmingham.

In an action against A. B. and C. D. on this note by Robertson, who declared, as manager of the National Provincial Bank of England, not styling himself public officer, it was objected, that the action should have been brought by the bank, suing by their public officer; but it was ruled, that the facts stated were distinct evidence to go to the jury, that the plaintiff was the manager intended in the note, and that it was not open to the defendants to contend that the bank ought to have sued by its public officer, and the judgment was against the defendants (*m*).

A banking company, being the holder of bills indorsed to them in blank, may authorize their manager to sue upon such bills (*n*).

An instrument, in the form of a bill of exchange, drawn by the manager of a branch bank, by order of the directors, on the head office, but expressed in the body of it thus, "pay, without acceptance," may be treated as a promissory note, and the directors may be sued as makers by an indorsee or a holder (*o*).

(*m*) *Robertson v. Sheward*, 1 M. & G. 511.

(*n*) *Law v. Parnell*, 7 C. B., N. S. 282; 30 L. J., C. P. 17.

(*o*) *Miller v. Thomson*, 3 M. & G. 576.

The public officer is not necessarily manager of the affairs of the copartnership (*p*); one person, however, may discharge both offices; whether in any given case that is so or not, must depend, in general, upon the terms of the deed of settlement, which also is the source to ascertain whether any act is within the scope of the authority, or not, of the manager, or public officer. What is the authority and the extent of it are questions of fact, and the answer is to be sought for in the deed of settlement, in the first instance; if that is silent on the subject, then, evidence of what acts are usually performed by managers, or what acts the manager of the particular company has been used to perform, as the case may be, must be resorted to (*q*).

It will be most convenient to define in the articles of association, as carefully and fully as possible, the duties and powers of the manager, especially as regards external acts, such as the extent to which, and the form in which, he may bind the company, by accepting or indorsing bills, taking up or advancing loans, &c.

The situation of manager is one of high trust, but the trust becomes still greater, and the responsibility much enhanced, in the case of a *local* manager of a branch establishment of the bank. For many purposes he is looked upon by the law, and is treated as if he were the whole body, whom he has power to bind even by his tortious acts, although he may not be a partner.

For instance, if a local manager of a branch bank gets into his hands the money of a customer of the bank, by inducing the customer to consider that he is acting in the transaction as agent of the bank, and is invested with authority to effect the purposes for which the customer confides the money to him, and then appropriates the money to his own purposes, the customer's loss will fall upon the copartnership. To hold the bank not to be liable in such

(*p*) 6 C. B. 766.

(*q*) *Eyre v. M'Dowell*, 14 Ir. Com. Law Rep. 314.

case would be, it has been said, to hand over the public to the mercy of the clerks employed by these banks. The principle seems to be, that the manager is a servant whom the bank, for the purposes of their trade, virtually accredit, and hold out to the world as invested by them with general authority to act for them in the affairs of the branch bank; and the public have no power or means to discriminate what is, and what is not, in any particular case, within the legitimate scope of the agent's powers, or in accordance with the directions of his principals; and, therefore, when a customer, in a matter connected with his relations with the branch bank, confides in the servant, he, in fact, trusts the masters, and they are liable accordingly for the fraud of the servant whom they have appointed (*r*).

A manager and cashier of a bank obtained the signature of B. to a document in the form of a cheque, purporting to be drawn upon the bank by B., under the pretence that it was a receipt for a private debt due to him from the manager. B. was an illiterate person, and unable to read, and the manager then paid B. his debt with the banker's money. The transaction was entered in the bank books, as a loan by the bank to B., upon his cheque. B. was not a customer of the banker; it was held that the banker was not entitled to recover back the money from B., for the cheque was obtained by the fraud of the banker's agent, and that he must suffer the loss, if the manager were unable to make it good (*s*).

That the manager of a branch bank must necessarily have a larger authority than usually attaches to agents is apparent from this: an agent, in general, has no authority implied by law, and, independently of his particular instructions, to borrow money for the service of his principals in the business he conducts for them; to obtain deposits, that is, to obtain loans of money for his employers, is one principal part of the business of a manager of a branch

(*r*) *Thompson v. Bell*, 10 Exch. 11; see *Pickering v. Busk*, 15 East, 53.

(*s*) *Foster v. Green*, 1 H. & N. 881, 31 L. J., Exch. 158.

bank ; his power, in this respect, is unlimited ; and thus he makes them responsible for every shilling which he receives from a customer of the bank.

So, if he advances money on loan, the loss, if any, must fall on the shareholders of the bank : thus, in a case where the manager of a branch bank had advanced money to the agent of a mining concern, to pay the wages of the labourers in the mine, which were in arrear, and for which they had obtained warrants of distress upon the materials, &c., in the mine, the copartnership of the bank was unable to recover the amount of the advances, by action, against a shareholder in the mine, on the ground that an agent, in general, has no implied authority to borrow money for the service of his employers, and there was no evidence of any special authority having been given by the shareholders, although the money had been applied in payment of the wages due from the shareholders to the labourers (*t*).

In respect of any contract, into which the manager may enter on behalf of a branch bank, provided it falls within the usual course of banking business, although, under the deed of settlement, or otherwise, the manager may be restricted from entering into contracts of that particular class, there being no proof that the party, with whom the contract was entered into, was cognizant of the restriction, the copartnership will be liable (*u*).

The criminal liability of managers will be mentioned in a subsequent chapter.

(*t*) *Hawtayne v. Bourne*, 7 M. & W. 595.

(*u*) *Hawken v. Bourne*, 8 M. & W. 709 ; see *Ex parte Chippendale*, 4 De G., Mac. & G. 19.

CHAPTER XXXV.

PUBLIC OFFICER.

THE 7 Geo. IV. c. 46, which legalized the establishment of banking copartnerships in England, exceeding a radius of sixty-five miles from London, required them to nominate and appoint two or more public officers, being members and resident in England, and also empowered them to sue and be sued in the name of one of such public officers (*a*). The duties which this act imposes upon a public officer are the making out, verifying on oath, and delivering to the stamp office the several annual returns in the forms prescribed, as pointed out in a former chapter (*b*). These provisions applied only to banking companies established *beyond* sixty-five miles from London. The 3 & 4 Will. IV. c. 98, which enabled banking companies to establish themselves *within* sixty-five miles of London, did not confer upon them the power or privilege of suing or being sued in the name of a public officer. The 7 & 8 Vict. c. 113, s. 47, first conferred this power or privilege upon these banking companies, if established before the 6th of May, 1844, provided they made out and delivered, from time to time, to the Board of Inland Revenue, the returns required by the 7 Geo. IV. c. 46, and all the provisions of such act are to apply to the accounts or returns so made out and delivered by such companies, as if they had been originally included in the provisions of the 7 Geo. IV. c. 46. The 25 & 26 Vict. c. 89 (*c*), although it repeals the 7 & 8 Vict. c. 113, expressly re-enacts the 47th section, and consequently banking companies carrying on business within

(*a*) 7 Geo. 4, c. 46, s. 9.

(*b*) Chapter XXVI., ante, 443—445.

(*c*) 25 & 26 Vict. c. 89, s. 205. Third Schedule, Part II.

sixty-five miles of London, are bound to make these returns. The appointment of public officers by banking companies, formed under the provisions of the 7 & 8 Vict. c. 113, became altogether unnecessary on their obtaining charters of incorporation; neither are public officers required to be appointed by banking companies established under the Act of 1862, as on registration these companies become entitled to all the privileges of incorporated bodies (*d*).

The appointment of public officers, when required, is regulated by the terms of the deed of settlement of the company, and should generally be made by a deed. The appointment may be proved by a certified copy of the official return to the stamp office, or by the production of the instrument appointing him (*e*).

Banking copartnerships surrendering their right to issue their own bank notes, by agreement with the Bank of England, do not lose the privilege of suing or being sued in the name of their public officer (*f*).

Actions and Suits.—It appears to be evidently the intention of the legislature that the company should always have a public officer in existence, who may sue and be sued (*g*); and that the company is compellable by law to appoint one.

In an action by a public officer, it is usual, though not essential, to allege, in the declaration, that the plaintiff, at the commencement of the suit (*h*), had been named and duly appointed one of the public officers of the copartnership; but it is not necessary to state that he is a member of the company, or that he has been duly registered (*i*), or that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership (*k*).

(*d*) 25 & 26 Vict. c. 89, s. 18.

(*e*) *Edward v. Buchanan*, 3 B. & Ad. 788.

(*f*) 27 & 28 Vict. c. 86.

(*g*) *Steward v. Greaves*, 10 M. & W. 721; *Todd v. Wright*, 16 L. J., Q. B. 311.

(*h*) *Esdaile v. Maclean*, 15 M. & W. 277; *M'Intyre v. Miller*, 13 M. & W. 725.

(*i*) *Spiller v. Johnson*, 6 M. & W. 570.

(*k*) *Christie v. Peart*, 7 M. & W. 491.

A banking copartnership, since 1 & 2 Vict. c. 96, s. 1, may sue for the price of shares by their public officer (*l*).

They may also sue members jointly with strangers (*m*), by their public officer.

Notwithstanding the change of name of the copartnership, and the accession of fresh proprietors, the increase of their capital, and the addition of fresh directors, the public officer of the new copartnership may sue as a public officer, on a guarantie given to the company before the alteration (*n*).

A public officer may sue after the copartnership has suspended payment, and the establishment is kept open only for the purpose of winding up (*o*).

A copartnership having become insolvent, and ceased to carry on business, the public officer instituted a suit in equity, charging some of the directors with losses, by reason of unauthorized speculations in shipping, and of a fraudulent transaction by a deed of arrangement with a debtor to the company, praying relief in respect of all these matters, and to have the deed set aside. The suit was considered to have been properly instituted by the public officer, although the company had ceased to carry on business; that directors and trustees, not charged with improper transactions or fraud, need not be made parties to the suit; but the manager, who, it appeared, was mixed up in these transactions, ought to be made a party; and that though there were several distinct transactions, they were properly comprised in a single suit (*p*).

So, although a warrant of attorney has been given to trustees of the copartnership to secure a debt due to the copartnership, the judgment thereon can only be entered up in the name of the public officer (*q*).

(*l*) This was assumed in *Davidson v. Bower*, 4 M. & G. 626; 2 Dowl., N. S. 115.

(*m*) *Manners v. Rowley*, 10 Sim. 471.

(*n*) *Wilson v. Craven*, 8 M. & W. 584.

(*o*) *Davidson v. Cooper*, 11 M. & W. 778.

(*p*) *Harrison v. Brown*, 5 De G. & S. 733.

(*q*) *Bell v. Fisk*, 12 C. B. 493.

So the public officer is to sue on a breach of covenant with trustees of the copartnership to pay calls (*r*), and, in general, is the only proper party to sue on all covenants in the deed of settlement; although the covenants are made with trustees (*s*).

But a note payable to the order of a person, who is a trustee for the company, must, if unindorsed, be sued upon by the payee, and not by the public officer of the company (*t*).

The company will not be bound by a judgment in an action by a person not at the time their public officer; and hence, if a defendant, in an action purporting to be brought by a public officer of a company, traverses his appointment as public officer, and has a verdict on that issue, it is a good defence (*u*).

The public officer may file a petition for adjudication of bankruptcy, or sue out a judgment debtor summons against a debtor indebted to the copartnership, provided, in the declaration signed by him, he declares that he is such public officer, and entitled to sue (*x*).

So he may prove on a bankrupt's estate in like manner (*y*).

Both the public officers must not sue at once (*z*).

Liabilities.—In an action in which a public officer sues on behalf of the company, interrogatories may be administered to him, and he must answer them (*a*).

When an action is brought against the public officer of a copartnership, as such, he will not be permitted to plead that he has become bankrupt; for he is a mere parliamentary defendant; he represents the interests, perhaps, of

(*r*) *Wills v. Sutherland*, 4 Exch. 211.

(*s*) *Chapman v. Milvain*, 5 Exch. 61.

(*t*) *M'Dowell v. Doyle*, 7 Ir. Com. Law Rep. 598.

(*u*) *Barnewall v. Sutherland*, 19 L. J., C. P. 292.

(*x*) 24 & 25 Vict. c. 134, s. 92.

(*y*) *Id.* s. 144. See a form of declaration for proof of debt by a public officer in Shelford's Law of Joint Stock Companies, p. 93.

(*z*) *Holmes v. Binney*, 6 Scott, 346. As to suing both, 16 M. & W. 669.

(*a*) *M'Kewan v. Rolt*, 28 L. J., Exch. 380.

several hundred persons, and, if he were to be allowed to plead such a plea, of a matter merely personal to himself, in bar of the action, he would confer the benefit of that defence on all those whom he represents as defendants, but as a mere name. In such a case, however, the plaintiff would be restrained from issuing execution against the defendant, or his estate (a).

Accordingly, it has been held, where a deed of settlement provided, that if any of the public officers became bankrupt he should become disqualified, and his office should become vacant, that the proper construction was not that the person should cease to be public officer absolutely, but only at the election of the company (b). If bankruptcy, *per se*, disqualified, the company could have had no election.

So, a person sued, as public officer, will not be allowed to plead that he is not public officer, *together* with other pleas going to the merits of the action. He may rely on that plea as his sole defence, if he chooses; but, as the company are the real defendants, they must rely on such defence as they have to the merits of the action; they cannot be allowed to turn the plaintiff round on so mere a matter of form as whether the defendant was public officer at the commencement of the suit (c).

Death, Resignation or Removal.—The death, resignation, or removal of a public officer will not abate any action, suit, or proceeding commenced by or on the behalf of or against the copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of the copartnership for the time being (d). If the public officer dies during the progress of an action, a suggestion of his death,

(a) *Steward v. Dunn*, 11 M. & W. 63.

(b) *Id.*, 12 M. & W. 655.

(c) *Needham v. Law*, 11 M. & W. 400.

(d) 7 Geo. 4, c. 46, s. 9.

and of the appointment of his successor, should be entered on the proceedings before the next step is taken, otherwise they may be set aside for informality (*e*).

A *cognovit actionem*, given to a public officer, was considered to be sufficient, after his removal, to authorize a succeeding public officer to enter up judgment in his own name (*f*). To enter it up in the name of the officer, in whose time the cognovit was given, would be erroneous (*g*).

When the public officer dies after judgment obtained in an action, and, after the issuing of a writ of *ca. sa.*, but before its execution, this does not cause the action, or the proceedings consequent on it, to abate, and, therefore, the defendant may be taken in execution (*h*).

In equity, it is considered, as there is no change of interest, to be unnecessary to file any supplemental bill, in order to make a new registered public officer party to the suit (*i*).

Indemnity.—A public officer, in whose name any suit or action has been commenced, prosecuted or defended, sustaining any loss, damages, costs, or charges will be entitled to reimbursement out of the funds of the copartnership, or, in failure thereof, to contribution from the other members, as in a case of an ordinary partnership (*k*).

Indictments.—Prosecutions by public officers on behalf of the company, and their criminal liability, will be treated of in the next chapter.

(*e*) *Barnewall v. Sutherland*, 19 L. J., C. P. 290; S. C., 14 Jur. 720; 9 C. B. 380.

(*f*) This seems to be the effect of the judgment in *Webb v. Taylor*, 1 D. & L. 676.

(*g*) See 1 D. & L. 687; *Probin v. Locock*, 1 Dowl., N. S. 197.

(*h*) *Todd v. Wright*, 16 L. J., Q. B. 311; *Ellis v. Griffiths*, 16 M. & W. 106.

(*i*) *Butchart v. Dresser*, 18 L. J., Chanc. 198, 10 Hare, 453.

(*k*) 7 Geo. 4, c. 46, s. 14.

CHAPTER XXXVI.

CRIMINAL LIABILITY OF MEMBERS AND OFFICERS OF
BANKING COMPANIES.

THE members of the copartnerships either established beyond sixty-five miles from London under the 7 Geo. IV. c. 46, or established in London, or within sixty-five miles of London under the 3 & 4 Will. IV. c. 98, s. 3, may be prosecuted in the name of their public officer for any misdemeanor or felony committed by them against these copartnerships as if they were strangers(*a*). A clerk may therefore be convicted of embezzling or stealing the property of one of these copartnerships, although he is a shareholder(*b*). The property may be alleged in an indictment for larceny or embezzlement to belong to one of the public officers or of one of the members named and others(*c*). The members of banking companies formed under the 7 & 8 Vict. c. 113, or registered under the 20 & 21 Vict. c. 49, or the 25 & 26 Vict. c. 89, committing fraudulent or other criminal acts against these companies, will be liable to prosecution at the suit of and in the registered or corporate name of the particular company.

The legislature has created certain specific acts of directors, members, managers and public officers, misdemeanors, to which it will be necessary to refer in detail.

Fraudulently appropriating the Property of the Company.
—A director, member or public officer, who fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or purposes of the company,

(*a*) 3 & 4 Vict. c. 111, s. 2 ; made perpetual by 5 & 6 Vict. c. 85.

(*b*) *Reg. v. Atkinson*, Car. & M. 525, 2 Mood. C. C. 278.

(*c*) 7 Geo. 4, c. 64, s. 14 ; *Reg. v. Pritchard*, 30 L. J., M. C. 169.

any of the property (*d*) of the company, will be guilty of a misdemeanor (*e*).

Keeping Fraudulent Accounts.—A director, public officer or manager who receives or possesses himself of any of the property of the company, otherwise than in payment of a just debt or demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of the company, will commit a misdemeanor (*f*).

Falsifying or destroying Accounts or Documents.—So a director, manager, public officer or member, who with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security (*g*) belonging to the company, or makes or concurs in the making of any false entry, or omits or concurs in omitting any material particular, in any book of account or other document, will be guilty of a misdemeanor (*h*).

Publishing false Statements or Balance Sheets.—A director, manager or public officer, making, circulating or publishing, or concurring in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of the company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to the company, or to enter into any security for the benefit thereof, will be guilty of a misdemeanor (*i*).

A false representation by an officer or a servant of a company, even though when made at the bank is not the

(*d*) For a definition of this word, see ante, 345, n.

(*e*) 24 & 25 Vict. c. 96, s. 81.

(*f*) *Id.* s. 82.

(*g*) For a definition of this word, see ante, 344.

(*h*) 24 & 25 Vict. c. 96, s. 83.

(*i*) *Id.* s. 84.

representation of the company (*k*). A false representation, in order to be the representation of the company, must be made by a report adopted at a general meeting, and put forth to the public either intentionally or circulated in the ordinary course of business (*k*).

The directors of a bank are liable also to be indicted for a conspiracy to defraud by publishing false balance sheets and circulating false reports as to the condition and solvency of their bank, and issuing new shares to the public, at a time when they know the bank to be in a state of insolvency. The manager will be equally liable with the directors under such circumstances, where he has the chief control and management of all the affairs and transactions of the bank (*l*).

With respect to the foregoing misdemeanors, it is provided, as in the case of bankers fraudulently misapplying or disposing of securities or property intrusted to their care, that the parties are not to be privileged from answering questions in relation to the charges in any civil proceedings, nor on making disclosures in any compulsory proceeding liable to criminal prosecution (*m*).

Neither is any criminal prosecution for the commission of any of these misdemeanors to affect or prejudice any remedy or right at law or in equity against the delinquent parties. Convictions (*n*) are not, however, to be admissible in evidence in civil proceedings (*o*).

The Companies Act of 1862 provides for the prosecution of directors and other officers, found, on the winding-up

(*k*) *Ex parte Frowd*, 9 W. R. 328, 3 L. T., N. S. 843.

(*l*) *Reg. v. Esdaile*, 1 F. & F. 213, and the report of the trial of the *Attorney-General v. Brown and others*, coram Lord Campbell, Feb. 1858, by J. C. Evans, Esq., and published by Messrs. Stevens & Norton, Bell Yard.

(*m*) See ante, 345, 346; 25 & 26 Vict. c. 96, ss. 85, 86.

(*n*) The punishment on conviction for any of these misdemeanors is defined by sect. 75 of the 24 & 25 Vict. c. 96, to be penal servitude for not more than seven nor less than five years (by 27 & 28 Vict. c. 47, s. 4), or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement. These misdemeanors, however, cannot be prosecuted or tried at quarter sessions—sect. 87.

(*o*) 25 & 26 Vict. c. 96, s. 86.

of a company, to be delinquents. The following are the provisions relating to this subject:—

Power of Court to assess Damages.—If, in the course of winding-up proceedings, it should appear that a past or present director, manager or officer, has misapplied or retained, or become liable or accountable for any monies of the company, or has been guilty of misfeasance or breach of trust in relation to the company, the court may, on the application of a liquidator or of a contributory or creditor, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of the director, manager or officer, and compel him to repay the monies so misapplied or retained, or for which he has become liable or accountable, with interest, or to contribute such sums of money to the assets of the company by way of compensation, as the court may think just (*p*).

Falsification of Books.—If a director, officer or contributory of a company winding-up should be found to have destroyed, mutilated, altered or falsified any books, papers, writings or securities, or to have made or been privy to the making of any false or fraudulent entry in any registry, book of account or other document belonging to the company, with intent to defraud or deceive any person, every person so offending will be deemed guilty of a misdemeanor, and upon being convicted will be liable to imprisonment for any term not exceeding two years, with or without hard labour (*q*).

Prosecution of Delinquent Directors.—Where there is an order for winding-up a company by the court, or, subject to the supervision of the court, if it should appear in the course of such winding-up that a past or present

(*p*) 25 & 26 Vict. c. 89, s. 165.

(*q*) *Id.* s. 166.

director, manager, officer or member, has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in the winding-up, or of its own motion, direct the official liquidator or the liquidator (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company(*r*). This application must be made by petition(*s*).

Prosecution of delinquent Directors, &c., under a voluntary Winding-up.—Where the winding-up is altogether voluntary, if it should appear to the liquidators that a past or present director, manager, officer or member, has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred in the prosecution will be payable out of the assets of the company, in priority to all other liabilities(*t*).

The application to the court for the purpose of instituting the prosecution must be by petition(*u*). In the above provisions a liquidator abusing his trust or office is included(*x*).

(*r*) 25 & 26 Vict. c. 89, s. 167.

(*s*) Can. Ord. r. 51, 11th November, 1862.

(*t*) 25 & 26 Vict. c. 89, s. 168.

(*u*) Can. Ord. r. 51, 11th November, 1862.

(*x*) 25 & 26 Vict. c. 89, s. 165.

CHAPTER XXXVII.

SAVINGS' BANKS.

A SAVINGS' BANK is defined to be an institution, in the nature of a bank, formed or established for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof, to the depositors, their executors or administrators—deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution—but deriving no benefit whatsoever from any such deposit or the produce thereof (*a*). A savings' bank company is not necessarily a banking company (*b*).

In 1863, the previous acts relating to savings' banks in England and Ireland were repealed, and new provisions were made for their management and establishment, which are consolidated into one act (*c*).

Savings' banks cannot be formed after the 28th of July, 1863, under the provisions of the new statute, unless they have received the previous sanction and approval of the Commissioners for the Reduction of the National Debt, or the Comptroller-General or Assistant-Comptroller acting

(*a*) 9 Geo. 4, c. 92, s. 2; 26 & 27 Vict. c. 87, s. 2.

(*b*) *Coe, Ex parte*, 10 W. R. 138; 31 L. J., Bank. 8.

(*c*) 26 & 27 Vict. c. 87. This act repeals the 9 Geo. 4, c. 92; 3 Will. 4, c. 14, ss. 21, 22, 25, 28, 29—35; 5 & 6 Will. 4, c. 57; 7 & 8 Vict. c. 83; 11 & 12 Vict. c. 133; 17 & 18 Vict. c. 50, s. 2; 22 & 23 Vict. c. 53; and 23 & 24 Vict. c. 137. The 59 Geo. 3, c. 62, as to Scotland, remains in force until the Scotch Savings' Banks adopt the Act of 1863. By 26 Vict. c. 25, the National Debt Commissioners may invest the savings of banks under 9 Geo. 4, c. 92.

under the Commissioners (*d*). The rules and regulations for the management of savings' banks must be entered in books kept for the purpose, and open for the inspection of depositors, or the managers and trustees will not be entitled to avail themselves of the privileges or powers conferred by the enactment (*e*).

Banks established either under the provisions of the repealed statutes, or of the Act of 1863, are to be certified by the title of "Savings' Bank certified under the Act of 1863," and the members of any other bank, association or company, or any other person, using or adopting such title as their designation for carrying on business, will be guilty of a misdemeanor, and on conviction will be punishable accordingly (*f*).

Deposits.—No person can become a depositor for the first time, without disclosing his name, profession, business, occupation, calling and residence (*g*).

Every person at the time of his first deposit must, and afterwards as often as required by the trustees or managers, make and sign a declaration, of not being entitled to any deposit in or benefit from any other savings' bank: and this under pain of forfeiting the deposit or benefit, if in the opinion of the barrister the deposit was made with a fraudulent intention: such declaration is to be filed and kept by the trustees; a printed notice of this regulation being affixed in the bank; and a copy of the declaration, with notice of the penalty, annexed to or printed at the beginning of the deposit book (*h*).

No one can deposit more than 30*l.* in any one year, exclusive of compound interest (*i*).

Moreover, deposits cannot be received from any depo-

(*d*) 26 & 27 Vict. c. 87, s. 2.

(*e*) *Id.* s. 3.

(*f*) *Id.* s. 5.

(*g*) *Id.* s. 36.

(*h*) *Id.* c. 38.

(*i*) *Id.* s. 39. Depositors may transfer their deposits to any other savings' bank, s. 40.

sitor, so as to make the sum to which he shall be entitled exceed 150*l.* in the whole, exclusive of interest (*i*).

Although a depositor's money may go on increasing, at compound interest, until it reaches 200*l.* in the whole, yet, thenceforth, no interest will be payable on such deposit, so long as it remains at that amount (*i*).

Attempts at evasion of the statute, in this respect, by taking advantage of the clauses enabling persons to deposit money in trust for others, will be treated as follows:—

A., after depositing in his own name, in a savings' bank, to the full extent allowed, made further deposits to another account in the name of himself and his sister, but nominally as a trustee for her, in this form:—"Henry Field, in trust for Ann Field," making a declaration accordingly. It appeared, on examination, that the statute, whilst allowing one person to deposit money in trust for another person, in their joint names, still left him at liberty to withdraw it, without any communication with that person.

A Court of Equity, considering that the second account had been opened only with a view of evading the statute, and not with the intention of creating a trust in favour of the sister, refused to declare her to be entitled to the sum deposited to the second account (*k*).

When a married woman puts money into a bank, or a woman, who afterwards marries, does so, in either case the trustees or managers may pay the whole, or any part, to her, unless the husband shall give them notice in writing of the marriage, and require payment to be made to him (*l*). Deposits may be received from minors and paid to them (*m*).

Deposits may be received from the trustees or treasurers of any friendly society legally enrolled or certified in the

(*i*) 26 & 27 Vict. c. 87, s. 39. Depositors dying having 50*l.*, or over that sum, how payable to representatives, ss. 41, 42, 43. See *Marsden, In re*, 1 S. & T. 542.

(*k*) *Field v. Lonsdale*, 13 Beav. 78.

(*l*) 26 & 27 Vict. c. 87, s. 31.

(*m*) *Id.* s. 30.

manner required by the acts in force relating to friendly societies, without restriction as to amount (*n*), and from the trustees or treasurers of any charitable or provident institution or society, or charitable donation or bequest, for the maintenance, education or benefit of the poor, or of any penny savings' bank within the United Kingdom, to the amount of 100*l. per annum*, and of 300*l.* in the whole, exclusive of interest (*o*); but funds of benefit building societies are not allowed to be invested in savings' banks (*p*).

Annuities.—Depositors in savings' banks are enabled to purchase annuities of not less than one nor more than thirty pounds each (*q*).

Deposit Book.—By the rules of a savings' bank, entries of deposits were to be made in a book kept by the bank for the purpose, and also in a duplicate account book to be kept by the depositor, which duplicate was to be a voucher for the party producing it, and a receipt for the bank, when it was handed over to them. A. deposited in the name of B. a sum with the bank, and afterwards, without B.'s authority, got back the money, and delivered up to the bank the duplicate account book.

Nevertheless B., it was held, still continued a depositor (*r*); showing the bank to be liable for having allowed B.'s money to be drawn out without B.'s license.

Provision must be made in the rules of all savings' banks for every depositor, once a year at least, causing his deposit book to be produced at the bank for the purpose of being examined (*s*).

Remedies of Depositors.—Any dispute arising between

(*n*) 26 & 27 Vict. c. 87, s. 33.

(*o*) *Id.* s. 32.

(*p*) 6 & 7 Will. 4, c. 32, s. 6.

(*q*) 16 & 17 Vict. c. 45.

(*r*) *Rex v. Cheadle Savings' Bank*, 1 A. & E. 323.

(*s*) 26 & 27 Vict. c. 87, s. 6.

the trustees and managers and an individual depositor, or his executor, administrator, next of kin or creditor or assignee, or a person claiming to be entitled to any deposit, is to be referred in writing to the barrister appointed under the Savings' Banks Acts, who has power to proceed ex parte on a notice in writing to the trustees or managers being left or sent through the Post Office to the office of the bank, and whatever award, order or determination he may make will be binding and conclusive on all parties and final to all intents and purposes, without any appeal (*t*). The submission and award are exempt from stamp duty (*u*).

An action is not maintainable by depositors against trustees or managers to recover their deposits; they must have recourse to the mode of reference pointed out by the statute (*x*).

Investments.—The trustees must pay into the Bank of England or the Bank of Ireland, as the case may require, all sums to be invested in the names of the Commissioners for the Reduction of the National Debt, that is to say, all the deposits they receive, except such sums as from time to time may necessarily remain in the hands of the treasurers to answer the exigencies of the savings' bank; and they are not to invest in any other manner or upon any other security (*y*); and all monies so paid into the Bank of England or Ireland must be invested by the commissioners from time to time in the purchase of Bank Annuities or Exchequer Bills or parliamentary securities of whatsoever kind, created or issued under the authority of any Act or Acts of Parliament for the interest on which provision is made by Parliament, or any stock or debenture or other securities expressly guaranteed by authority of Parliament, and the interest, as it becomes due thereon, is in like manner to be

(*t*) 26 & 27 Vict. c. 87, s. 48. He may inspect books and administer oaths, *Id.* s. 49; see *Lynch v. Fitzgerald*, 15 Law Times, 372.

(*u*) *Id.* s. 50.

(*x*) See 8 Bing. 394; 6 A. & E. 952; 21 L. J., Q. B. 169.

(*y*) 26 & 27 Vict. c. 87, s. 15.

invested in these Government Annuities, Exchequer Bills or securities (*z*).

Weekly and Annual Accounts.—The trustees and managers are to transmit weekly returns to the Commissioners for the Reduction of the National Debt, showing the amounts of the week's transactions and the amount of the cash balances in the hands of the treasurer or other person on account of the bank (*a*). The trustees and managers are annually to prepare a general statement of the funds of the savings' bank invested in the Bank of England or the Bank of Ireland, showing the balance or principal sum due to all the depositors collectively, the expenses incurred, and stating in whose hands the balance shall be (*b*). If the trustees neglect to make out and transmit this statement to the commissioners, the commissioners may close the account of the trustees (*b*). Every depositor is entitled to a printed copy of the annual statement on payment of a penny (*c*).

Officers.—Every treasurer, actuary or cashier, being intrusted with the receipt or custody of money subscribed or deposited for the purpose of the bank, or any interest or dividend from time to time accruing therefrom, and every officer receiving any salary or allowance for his services from the funds of the savings' bank, must give security by bond, with one or more sureties, to the Comptroller-General of the National Debt Office for the time without fee or reward (*d*), and the bond when executed is to be deposited with the Commissioners for the Reduction of the National Debt (*d*).

With the view of securing savings' bank depositors

(*z*) 26 & 27 Vict. c. 87, s. 19.

(*a*) *Id.* s. 7.

(*b*) *Id.* s. 55. As to computation and rate of interest, *Id.* ss. 21, 22, 23.

(*c*) *Id.* s. 59.

(*d*) *Id.* s. 8.

against loss by the acts or misconduct of the officers employed, the legislature has given a prior or precedent claim over their estate or goods in the event of their bankruptcy or death.

The provision is, that if any person appointed to any office in a savings' bank, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any moneys or effects belonging to the bank, or any deeds or securities relating to the same, dies or becomes bankrupt or insolvent, or has any execution or attachment or other process issued against his lands, goods, chattels or effects, or makes any assignment for the benefit of his creditors,—then his executors, administrators or assignees, or other persons having legal right, according to the case, or the sheriff or other officer executing such process, must, within forty days after demand, made by two of the trustees, deliver and pay over all moneys and other things belonging to the bank to such person as the trustees may appoint, and pay out of his estate, assets or effects, all money remaining due which such officer received by virtue of his office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by the process is paid over to the party issuing it, and all his assets, lands, goods, chattels, estates and effects shall be bound to the payment and discharge thereof accordingly (e).

A draper was appointed actuary and cashier of a savings' bank, a rule of which was, that one or more members of the committee should attend at the cashier's shop to receive the deposits; this rule, however, was not attended to, and the cashier was permitted to receive the deposits. He became bankrupt, and the deposits were held not to be "moneys in his hands by virtue of his office," so as to be claimable in full by the bank.

(e) 26 & 27 Vict. c. 87, s. 14.

The duty of the office of actuary did not include the receipt of money, which duty, by the rule, was imposed on one or more members of the committee; nor did the duty of cashier include the receipt of money for the same reason, for the duty of a cashier is to pay money; consequently the moneys were not in his hands, at the time of his bankruptcy, *by virtue of his office* (f).

In the case of the bankruptcy of any person in office in a savings' bank, the savings' bank can only be paid in full his debt to them, when they have conformed in all respects to the statute, and there has been no negligence or laches on the part of the manager or trustees of the institution.

Where a person on his appointment as treasurer of a savings' bank entered into the usual bond, but did not actually receive any money, the deposits being paid by the managers directly into a bank, of which he was a partner, to the credit of the trustees of the savings' bank, who were allowed interest on it, but he signed the monthly return to the National Debt Office, thereby acknowledging the balance to be in his hands as treasurer. On the bankruptcy of the bank, the savings' bank recovered in full (g).

An officer, being robbed of the moneys of the bank before the time for paying them over has arrived, would not be personally liable for the amount (h).

If an actuary, cashier, secretary or officer receives any sum or sums of money from or on account of a depositor or on account of the bank, and does not forthwith, or in the case of local receivers within the time specified in the rules, duly account for and pay over the same to the trustees or managers or to such persons as may be directed by the rules, he will on conviction be guilty of a misdemeanor (i).

(f) *Ex parte Fleet*, 4 De G. & S. 52; *The Dartford Savings' Bank*, see 1 Fonb. Bank. R. 137. The bankers of a Friendly Society are not officers, so as on their bankruptcy to entitle the society to be repaid in full. *Ex parte Harris*, De G. Bank. R. 162.

(g) *Ex parte Riddell*, 3 M., D. & De G. 80.

(h) *Walker v. Guarantee Association*, 18 Q. B. 277.

(i) 26 & 27 Vict. c. 87, s. 9.

All officers upon demand are bound to account for and deliver up all moneys, effects, funds or securities, books, papers or property, belonging to the bank in their hands, by order of not less than two trustees and three managers, or at any general meeting of the trustees or managers: on default, the trustees may exhibit a petition to the Quarter Sessions, who may proceed in a summary way, and make such order upon hearing all parties concerned, as they may think just, and such order will be final (*i*).

Trustees.—All moneys, goods, chattels and effects whatever, and all rights or claims, belonging to a savings' bank are vested in the trustees for the time being, without a fresh assignment or conveyance being necessary on the death or removal of any one or more of them(*k*); and in all criminal or civil proceedings shall be stated to be the property of the person or persons appointed trustee or trustees for the time being in his or their proper name without further description (*k*).

No trustee or manager is personally liable, except for his own acts and deeds: he is not personally liable for anything done by him in virtue of his office, except in cases where he is guilty of wilful neglect or default (*l*).

A trustee or manager of a savings' bank in Ireland, having declared in writing under his hand deposited with the Commissioners for the Reduction of the National Debt, that he is willing to be answerable for a specific amount only, such amount being in no case less than 100*l.*, will not be liable to make good any deficiency arising in the funds beyond the amount specified (*m*). This provision is not applicable to managers or trustees of savings' banks in England.

Nevertheless, every trustee and manager is personally responsible and liable for all moneys actually received by

(*i*) 26 & 27 Vict. c. 87, s. 13.

(*k*) *Id.* s. 10.

(*l*) *Id.* s. 11.

(*m*) *Id.* s. 12.

him on account of or for the use of the bank, and not paid over or disposed of according to the rules (*n*).

But a trustee or manager who is robbed of moneys before the time for paying them over, according to the rules, has elapsed, would not be personally liable to replace or restore the amount (*o*).

A trustee of a savings' bank may be indicted under the 24 & 25 Vict. c. 96, s. 80, as a fraudulent trustee for the misappropriation of moneys deposited with him (*p*).

For other points of minor importance the reader is referred to the statutes respecting savings' banks (*q*).

Military, Naval and Post Office Banks.—The legislature has provided by special measures for the establishment of military savings' banks, which are exempted from the operation of the enactments respecting savings' banks in general (*r*): of savings' banks for seamen (*s*), and of Post Office savings' banks having the direct security of the State for repayment of the deposits (*t*).

(*n*) 26 & 27 Vict. c. 87, s. 11.

(*o*) *Walker v. Guarantee Association*, 18 Q. B. 277.

(*p*) *Reg. v. Fletcher*, 31 L. J., M. C. 206.

(*q*) Exemptions from stamp and other duties in favour of savings' banks, 26 & 27 Vict. c. 87, s. 50; 3 & 4 Will. 4, c. 14, s. 19; from income tax, 5 & 6 Vict. c. 35, s. 88.

(*r*) 22 & 23 Vict. c. 20.

(*s*) 17 & 18 Vict. c. 104, s. 180; 19 & 20 Vict. c. 41.

(*t*) 24 Vict. c. 14; 26 Vict. c. 14.

CHAPTER XXXVIII.

ATTACHING FUNDS IN BANKERS' HANDS.

A CUSTOMER'S balance may be attached in the hands of his bankers under the garnishment clauses of the 17 & 18 Vict. c. 125, by a judgment creditor of the customer to answer his judgment debt (*a*). The account will be bound immediately upon the banker being served with a judge's order, and he cannot afterwards pay the amount otherwise than into Court, to the credit of the cause in which the attachment order was obtained, or under the authority of a judge's order (*b*). When the amount of the account is either paid into Court, or levied under an execution, it will be a valid discharge to the banker as against his customer, although the proceedings may be afterwards set aside or the judgment reversed (*c*).

In the city of London, funds in the possession of bankers, within the city, belonging to their customers, are liable to the process of foreign attachment (*d*). This process is much more extensive in its operation within the ambits of the city jurisdiction, than an attachment of debts under the provisions of the statute already mentioned (*d*). Under that statute, it will be observed, debts cannot be attached until judgment has been obtained; whereas, under the custom of the city, debts are attachable for the purpose of compelling the defendant to appear and put in bail to the action in the Lord Mayor's Court (*d*). Until a city attachment has been dissolved or withdrawn,

(*a*) *Seymour v. Brecon Corporation*, 29 L. J., Exch. 243; *In re Prichard*, 2 De G., F. & J. 354; 30 L. J., Chanc. 92; Brandon on Foreign Attachment, p. 24.

(*b*) 17 & 18 Vict. c. 125, s. 63; *Turner v. Jones*, 1 H. & N. 878; 26 L. J., Exch. 262.

(*c*) *Id.* s. 65.

(*d*) Brandon on Foreign Attachment, 6, 24.

a banker cannot part with or pay away funds belonging to his customers (*e*). But funds of foreign governments, in the hands of bankers as their agents for the payment of the dividends on foreign bonds or stocks, are not attachable at the suit of the creditors of such governments (*f*).

Accounts kept by collectors or receivers of government taxes with bankers may be seized under a writ of extent at the suit of the Court against the bankers (*g*). So an extent may be issued against a banker, with whom a collector has deposited promissory notes or bills of exchange taken by him in payment of taxes (*g*). If a collector pays moneys received by him for taxes to a third party who pays the same into his private account with his bankers, and the bankers have knowledge of the fact that the moneys are the moneys of the Crown, an extent may issue against the bankers for the recovery of such moneys (*h*). If by the terms of the deposits interest is payable by the bankers, that is also recoverable by the Crown (*g*).

Recently it has been alleged that there is a custom among bankers who have discounted their customers' bills of exchange, upon the acceptors suspending payment before their maturity, to call upon their customers to take them up, or, failing to do so, to retain their balances in their hands to meet the liability on the current bills (*i*). The custom has been denied, and its validity in point of law may be open to considerable doubts. The case in which the custom was alleged to exist was compromised and apparently in favour of the customer and against the claim, and consequently no decision was given (*i*).

(*e*) Brandon on Foreign Attachment, 104.

(*f*) *Wadsworth v. The Queen of Spain*, 17 Q. B. 171.

(*g*) *Reg. v. Adams*, 2 Exch. 299.

(*h*) *Reg. v. Ward*, 2 Exch. 301, n.

(*i*) *Agra and Masterman's Bank Limited v. Hoffmann*, 13 W. R. 226; 11 L. T., N. S. 701, coram Stuart, V. C.

CHAPTER XXXIX.

WINDING-UP AND DISSOLUTION OF BANKING COMPANIES.

WE propose in this chapter to state the law applicable to the winding-up of banking copartnerships and companies, unable to meet their engagements or to carry out the objects for which they were promoted, and the mode of dissolving them.

Banking copartnerships constituted under the 7 Geo. IV. c. 46, or under the 3 & 4 Will. IV. c. 98, or under the 6 Geo. IV. c. 42, as to Ireland, and not registered as limited or unlimited banking companies, under the Joint Stock Companies Act of 1862, must be wound up under the provisions of that act, as unregistered companies (*a*).

But banking companies formed under the 7 & 8 Vict. c. 113, or under the 21 & 22 Vict. c. 91, as limited, and registered under the 20 & 21 Vict. c. 49, or formed and registered under the Act of 1862, must be wound up under the provisions of the last-mentioned act (*b*).

The winding-up will be by a compulsory process, under the direct action and control of the Court of Chancery (*c*), or by a voluntary process aided by liquidators appointed by the companies (*d*). But companies which have not been registered as limited or unlimited banking companies, under the Act of 1862, cannot avail themselves of the voluntary process of winding-up—they must be wound up by the Court of Chancery (*e*).

Reversing the order of time in which these banks were established, we will first consider the winding-up of the

(*a*) 25 & 26 Vict. c. 89, s. 199.

(*b*) *Id.* ss. 179, 196.

(*c*) *Id.* s. 79.

(*d*) *Id.* s. 129.

(*e*) *Id.* s. 199 (2).

companies formed and registered under the Act of 1862, as many of its provisions will tend to elucidate the principles applicable to the winding-up of previously-existing companies; secondly, companies formed under the 7 & 8 Vict. c. 113, or under the 21 & 22 Vict. c. 91, as limited, registered under the 20 & 21 Vict. c. 49, and re-registered under the Act of 1862; and thirdly, copartnerships formed under the 7 Geo. IV. c. 46, and the 3 & 4 Will. IV. c. 98, and not registered under the 20 & 21 Vict. c. 49, or under the Act of 1862,—and the respective rights and liabilities of the members and contributories of these companies.

With regard, then, to the winding-up of limited banking companies, formed under the Act of 1862, it is to be remembered that the liability of the members is fundamentally and constitutionally limited to the amount unpaid on their respective shares (*f*); consequently, if the shares in these banking companies have been fully paid up, there will be no liability on the part of a past or present member to contribute to the debts of the company on its being wound up. On the other hand, if the shares have not been fully paid up, a past or present member may be called upon to contribute to the amount unpaid on his shares, subject to certain conditions and limitations (*g*). A member will not be liable to contribute, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up of the company (*g*). The commencement of the winding-up for this purpose is the time when the petition was presented to the Court of Chancery, in the case where it is compulsory (*h*), and where it is voluntary at the time when the resolution of the company, authorizing the winding-up, was passed (*i*). A past member will not be liable to contribute in respect of any debt or liability of the company contracted after the

(*f*) 25 & 26 Vict. c. 89, s. 7.

(*g*) *Id.* s. 38 (1).

(*h*) *Id.* s. 84.

(*i*) *Id.* s. 130.

time at which he has ceased to be a member (*k*). Nor will a past member be liable, unless it appears to the court that the existing members are unable to satisfy their contributions (*l*). Members will not be entitled to set off dividends or profits due to them as such against the claims of the creditors of the company, or to enter into competition with creditors, although on the final adjustment of their rights amongst themselves, as contributories, their claims in respect of dividends or profits may be taken into account (*m*).

With these qualifications, members present and past of limited banking companies will be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves (*n*).

Compulsory Winding-up.—A compulsory winding-up may be resorted to under the following circumstances, viz. :—

- (1.) Whenever the company has passed a special resolution requiring the company to be wound up by the court (*o*).
- (2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year (*o*).
- (3.) Whenever the company is unable to pay its debts (*o*).
- (4.) Whenever the court is of opinion that it is just and equitable that it should be wound up (*o*).

(*k*) 25 & 26 Vict. c. 89, s. 38 (2).

(*l*) *Id.* s. 38 (3).

(*m*) *Id.* (7).

(*n*) *Id.* s. 38.

(*o*) *Id.* s. 79. As to special resolutions, see ante, p. 480. The statute also specifies another reason, viz., whenever the members are reduced in number to less than seven, but as this is not likely to occur in a limited banking company, consisting of a large body of shareholders, it is not stated in the text.

A company will be deemed unable to pay its debts—

- (1.) Whenever a creditor, to whom the company is indebted in a sum exceeding 50*l.*, has served on the company, by leaving at its registered office, a written demand requiring the company to pay his debt, and the company has for three weeks neglected to pay the debt, or to secure or compound for the same, to the reasonable satisfaction of the creditor (*p*).
- (2.) Whenever an execution on a judgment, decree or order obtained by a creditor against the company, has been returned unsatisfied wholly or in part (*p*).
- (3.) Whenever it is proved to the satisfaction of the court, that the company is unable to pay its debts (*p*).

A company, however, will not be regarded as unable to pay its debts simply because it has not paid a debt which it disputes, and which the creditor has not established by action (*q*).

In the case of a banking company, the Lord Justice Turner has expressed an opinion that a winding-up by the court, rather than a voluntary winding-up, should be adopted in cases of enormous magnitude, where vast interests are at stake—where the most ample powers which the law has given must be required to be exercised—where there have been transactions justifying, if not requiring, investigation—where it may be doubtful whether the property of the shareholders will answer the liabilities, and where there is danger to the creditors of the shareholders escaping from their liabilities (*r*).

Petition.—A winding-up order will be obtained upon a petition presented to the Court of Chancery by the com-

(*p*) 25 & 26 Vict. c. 89, s. 80.

(*q*) *Ex parte Owen*, 4 L. T., N. S. 684.

(*r*) *In re Northumberland and Durham District Banking Company*, 2 De G. & J. 378.

pany, a creditor or a contributory (*r*). A holder of scrip certificates may petition for a winding-up order, on his clothing himself with the character of a contributory (*s*). But a holder of fully paid-up shares must show special circumstances to entitle him to an order (*t*).

A limited company, whose business is being carried on at a loss, without any reasonable prospect of ultimate success, may be wound up on the petition of a shareholder before the whole of the capital has been called up (*u*).

Restraining Actions against the Company.—The court may, after the petition has been presented, upon the application of the company, or of a creditor or a contributory, restrain proceedings in actions or suits against the company, and appoint a provisional liquidator (*v*).

When a winding-up order has been made, the act provides that no suit or action shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as it may impose (*x*).

The court is also empowered, upon the application of a creditor or contributory, to stay proceedings under the winding-up order, either altogether or for a limited time (*y*). The court may dismiss the petition with or without costs, or adjourn the hearing, or may make an interim or any other order that it may deem just under the circumstances of the case (*z*).

The court is to consult the wishes and interests of the creditors and contributories in all matters connected with the winding-up of the company (*a*).

Forwarding Order to Registrar.—A copy of the wind-

(*r*) 25 & 26 Vict. c. 89, s. 82. The details of practice and rules of court and forms will be found in Shelford's Joint Stock Companies Act, pp. 295—354.

(*s*) *Ellis, Ex parte*, 34 L. J., Chanc. 237; 11 Jur., N. S. 211—L. J.

(*t*) 11 Jur. N. S. 4—Romilly, M. R.

(*u*) *In Re Factage Parisien, Limited*, 34 L. J., Chanc. 140.

(*v*) 25 & 26 Vict. c. 89, s. 85.

(*x*) *Id.* s. 87.

(*z*) *Id.* s. 86.

(*y*) *Id.* s. 89.

(*a*) *Id.* s. 91.

ing-up order is to be forthwith forwarded by the company to the Registrar of Joint Stock Companies, who must make a minute of it in his books relating to the company (*b*).

Under a compulsory winding-up, the court has the power of appointing official liquidators for the purpose of assisting it in the conduct of the business. The powers and duties of official liquidators will be considered with those of liquidators appointed under a voluntary winding-up—to which head we now proceed.

Voluntary Winding-up.—A banking company may be wound up voluntarily in the events and under the circumstances following, viz. :—

- (1.) Whenever the period fixed for its duration by the articles of association has expired, or when it is provided by the articles that the company is to be dissolved, and it has passed a resolution in general meeting requiring the company to be wound up voluntarily (*c*).
- (2.) Whenever the company has passed a special resolution for that purpose (*c*).
- (3.) Whenever it has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same (*c*).

An extraordinary resolution (*c*) for this purpose will be when notice of the resolution has been given and confirmed in the same manner as a special resolution (*d*).

The winding-up commences to operate from the time when the resolution was passed (*e*). It will not preclude a creditor afterwards applying to the court to have the

(*b*) 25 & 26 Vict. c. 89, s. 88.

(*c*) *Id.* s. 129.

(*d*) See ante, p. 480, for the mode of passing special resolutions.

(*e*) 25 & 26 Vict. c. 89, s. 130.

company wound up by the court (*g*). Notice of the special or extraordinary resolution, as the case may be, must be advertized in the Gazette (*h*). The company thenceforth ceases practically to carry on its business, and transfers of shares, unauthorized by the liquidators, will be void, and the status of the members cannot be altered in their relations to the company (*i*). The corporate character of the company, with its incorporated powers, continues until formally dissolved (*i*). When the resolution has been passed and confirmed for winding-up the company voluntarily, the next step will be the appointment of one or more liquidators (*k*). On their appointment the powers of the directors determine, unless continued with the sanction of the company, or the liquidators (*k*). Their duties and powers will be considered in connexion with those of the official liquidators. The costs of a voluntary winding-up, including the remuneration of the liquidators, will be payable out of the assets of the company (*l*).

Winding-up under Supervision of the Court.—When a company is being wound up voluntarily, the proceeding may be transferred to and adopted by the Court of Chancery, and completed under its supervision. This course will be taken when the voluntary winding-up is not proceeding satisfactorily, or is inefficient in its working for the interests of creditors or contributories (*m*).

Liquidators.—The Court of Chancery, in winding-up a company under its control, generally appoints an official liquidator, who ought to be an entirely disinterested person—neither a creditor nor a shareholder of the company (*n*).

In all proceedings he will be described as the official

(*g*) 25 & 26 Vict. c. 89, s. 145.

(*h*) *Id.* s. 132.

(*i*) *Id.* s. 131.

(*k*) *Id.* s. 133.

(*l*) *Id.* s. 144.

(*m*) *Id.* s. 147.

(*n*) *In re Northumberland and Durham District Banking Company*, 2 De G. & J. 508.

liquidator of the particular company, and not in his individual name (*o*). His duty will be to take possession of all the property of the company, and perform such other acts in reference to the winding-up as the court may impose upon him (*o*). His powers will be to bring or defend actions or suits, or institute prosecutions in the name or on behalf of the company (*p*), to realize the property of the company (*p*), to prove in bankruptcy (*p*), and do and execute all matters that may be necessary for winding-up its affairs and distributing its assets (*p*). These powers may be exercised with or without the sanction or intervention of the Court of Chancery, if the court has made an order to that effect (*q*). Under a voluntary winding-up liquidators are appointed by the company, and the powers given to official liquidators may be exercised by them, without the sanction of the court (*r*). They have power to settle the list of contributories, and the list will be *primâ facie* evidence of the liability of the persons named therein as contributories (*r*). Before ascertaining the sufficiency of the assets, they may call upon the contributories to pay to the extent of their liability, for the liquidation of the debts of the company (*r*), and in making calls take into consideration the liability that some may fail to pay their respective proportions (*r*). They are also to adjust the rights of the contributories amongst themselves (*r*). The liquidators are also empowered, with the sanction of the court, where the company is being wound up under its control, or subject to its supervision, and with the sanction of an extraordinary resolution of the company, when it is being wound up voluntarily, to compromise calls, liabilities and claims between the company, its contributories or debtors (*s*), and to pay or settle with its several classes of creditors in full or otherwise (*s*).

(*o*) 25 & 26 Vict. c. 89, s. 94.

(*p*) *Id.* s. 95.

(*q*) *Id.* ss. 95, 96.

(*r*) *Id.* s. 133.

(*s*) *Id.* ss. 159, 160; Can. Ord. rr. 49, 50.

These arrangements will be binding on the company and creditors, subject to the right of creditors to appeal to the court within three weeks of their completion (*t*). The court, in sanctioning a compromise, exercises a judicial discretion, and will not direct the official liquidators to conclude a compromise without the means of itself forming an opinion as to the propriety of the terms of the compromise (*u*). Therefore, where official liquidators applied to the court to sanction a compromise, which had been proposed by a body of thirty-five shareholders, to pay among them an aggregate sum in discharge of their liabilities as shareholders, but without disclosing to the court the particulars or the data of such compromise, the court refused the application, although it was sworn that the compromise was founded upon details of property, and circumstances which, if divulged, would operate detrimentally to the thirty-five shareholders and to the interests of the company (*u*).

The liquidators are also empowered, with the like sanction of the court or company, where the property of the company is proposed to be sold to another company, to accept shares in such other company as the consideration of the purchase money (*v*). Official liquidators of a bank entered into a provisional contract with B. to sell him property belonging to the bank for 16,000*l*. At a meeting before the chief clerk in chambers, this contract was submitted for the approval of the judge, when it was objected to by the creditors, who stated that C., another purchaser, would give a higher price, and who afterwards offered 17,600*l*., it was held that the chief clerk was right in not adopting the provisional contract with B., if a larger sum could be obtained, and the official liquidators were directed by the court to carry out the contract with C. for 17,600*l*. (*x*).

(*t*) 25 & 26 Vict. c. 89, ss. 136, 137.

(*u*) *Ex parte Totty*, 29 L. J., Chanc. 702.

(*v*) 25 & 26 Vict. c. 89, s. 161.

(*x*) *In re Northumberland District Banking Company*, 9 W. R. 584; 5 L. T., N. S. 633.

The liquidators may appeal to the court to determine any question which may arise in the course of the exercise of their powers, on a voluntary winding-up (*y*). They have power also to call general meetings of the company, and if the winding-up should be prolonged beyond twelve months, they must at the end of each year lay before the meeting an account showing their acts and dealings and the manner in which the winding-up has been conducted during the preceding year (*y*). In the case of a vacancy in the office, another liquidator may be appointed, and the court may remove any liquidator on due cause (*z*).

Delinquent liquidators, as we have seen, will be liable to criminal prosecution (*a*).

We proceed to mention the winding-up of the second and third classes of banking companies.

Winding-up of Companies existing before 1862.—Banking companies formed under the 7 & 8 Vict. c. 113, or under the 21 & 22 Vict. c. 91, as limited, and respectively registered under the 20 & 21 Vict. c. 49, and the Act of 1862, will be wound up under the latter act (*b*), and all its provisions with regard to banking companies, formed and registered since the 2nd of November, 1862, will apply, with this exception, that persons liable at law or in equity, to contribute to the payment of the debts or liabilities of the company contracted prior to registration, and for the adjustment of the rights of the members among themselves, will be contributories in respect of such debts and liabilities (*c*). The Court of Chancery may, when the petition for the winding-up has been presented, on the application of a creditor, restrain further proceedings in actions or suits, as well against contributories as against the company (*d*), and legal proceedings cannot afterwards be com-

(*y*) 25 & 26 Vict. c. 89, s. 138.

(*z*) *Id.* ss. 140, 141.

(*a*) See ante, p. 545.

(*b*) 25 & 26 Vict. c. 89, ss. 179, 180.

(*c*) *Id.* s. 196.

(*d*) *Id.* s. 197.

menced against contributories, without the special leave of the court (*e*).

The members of unlimited banking companies registered under the 20 & 21 Vict. c. 49 (*f*), or under the Act of 1862, as limited banking companies, on winding-up, will be liable beyond the amount paid up on their respective shares for the debts of the company contracted or incurred previously to registration (*g*). The effect of registration in these instances is to make the company limited *quoad* liabilities incurred after registration, but unlimited *quoad* debts previously contracted (*g*).

So banking companies established under the 7 & 8 Geo. IV. c. 46, or under the 3 & 4 Will. IV. c. 98, or banking companies not registered as limited or unlimited, under the Act of 1862, will be wound up as unregistered companies (*h*), under that act, with this exception, that no such company can be wound up voluntarily, or subject to the supervision of the court (*i*). The circumstances under which such a company may be wound up are:—

- (1.) Whenever it is dissolved, or has ceased to carry on business, or is carrying on business merely for the purpose of winding-up (*k*).
- (2.) Whenever it is unable to pay its debts (*k*).
- (3.) Whenever the court is of opinion that it is just and equitable that the company should be wound up (*k*).

The circumstances under which an unregistered company will be considered as unable to pay its debts are similar to those already detailed in regard to registered companies (*l*). The Court of Chancery has a similar power of staying actions commenced by creditors against the

(*e*) 25 & 26 Vict. c. 89, s. 198.

(*f*) Sect. 8.

(*g*) *Ex parte Stevenson*, 32 L. J., Chanc. 96; *Garnett Gold Mining Company of America (Limited) v. Sutton*, 13 W. R. 412—Exch. Cham.

(*h*) 25 & 26 Vict. c. 89, s. 199.

(*i*) *Id.* s. 199 (2).

(*k*) *Id.* s. 199 (3).

(*l*) *Id.* s. 199 (4); and see ante, p. 561.

company or contributories, on the presentation of the winding-up petition (*m*), and of prohibiting the commencement of actions against contributories without its leave (*n*). The rights and liabilities of contributories to creditors and amongst themselves, under the winding-up, remain unaffected by recent legislation as to these copartnerships (*o*). Having seen when and under what circumstances banking copartnerships and companies may be wound up, it becomes now necessary to point out the parties who are liable as contributories, and the nature of their liability, and the mode of enforcing it. These matters will be the subject of the concluding portion of this chapter.

Contributories generally.—A contributory is defined, by the Act of 1862, to be every person liable to contribute to the assets of the company, in the event of the same being wound up, and in proceedings for determining the liability of contributories, any person alleged to be a contributory (*p*). Generally persons who are, or who ought to be, members in accordance with the provisions of the deed of settlement, or the regulations of the articles of association of the company, will be contributories, either in their own right or as representing others. Illustrations taken from the decisions of the cases will be the best guides in determining who are contributories in the absence of a more specific definition than is afforded by the statute.

It must be carefully borne in mind, with reference to the cases of contributories, that the liabilities of contributories are not always equal; each contributory is not always liable for the whole expenditure of the company; in the cases respecting contributories, all that is decided, when the court orders that such a person shall be placed on the list of contributories of the company, is, not that he

(*m*) 25 & 26 Vict. c. 89, s. 201.

(*n*) *Id.* s. 202.

(*o*) *Id.* s. 200.

(*p*) *Id.* s. 76.

is necessarily in precisely the same situation, with respect to pecuniary responsibility, as every other person who has been or may be placed upon the list, but only that in respect of shares that he holds or has held, (as his case may be,) he is liable to bear some share or other in aid of the liabilities of his fellow members of, or debtors to, the company. What he must eventually pay, as his proportion of the losses, remains for subsequent investigation, and the result depends on the number of shares he has held, on the mode in which they were transferred to him, the time during which he has held them, and a variety of other circumstances, and combinations of circumstances, differing in almost each particular instance (*q*).

The 7 Geo. IV. c. 46, s. 13, has no bearing on the question who are contributories.

Applicants and Allottees.—An allottee will not be a contributory, unless he has agreed in writing to take or accept shares. He may, however, after an application by letter for shares, and paying a deposit and before allotment, withdraw his application, and he will not be a contributory (*r*).

By the regulations of a company it was provided, that no person should be deemed to have accepted any share in the company unless he had testified his acceptance in writing under his hand in such form as the company from time to time directed, and the company not having prescribed any directions, it was held, that a letter of application for an allotment of shares in a printed form issued by the company and signed by the applicant, and containing these words, “and I hereby agree to accept the same,” was sufficient proof of his acceptance to satisfy the requirements (*s*).

(*q*) See *per* Lord Cottenham, C., in *Ex parte Mansfield (Earl)*, 2 Mac. & G. 671.

(*r*) *Ex parte Graham*, 30 L. J., Bank. 42.

(*s*) *Bog Lead Mining Company v. Montague*, 30 L. J., C. P. 380.

B. in person applied for 100 shares in a company, in respect of which 1*l.* per share was payable upon application, and 2*l.* per share on allotment. He at the same time gave to the secretary his cheque for 100*l.*, but before doing so he stipulated that if he did not get the shares in a few days the cheque or money was to be returned to him. Two days afterwards 100 shares were allotted to him, and his name was entered in a book described as a register of the allotment of shares. No notice of the allotment was ever given, and B. never paid the further 2*l.* per share or applied for a return of his money. The company having failed, it was held that there was a contract between the company and B., which was executed on the part of the former by the allotment; that it then became the duty of B. to pay the further 2*l.* per share; that notice of the allotment was not necessary to perfect the contract, and that he was a contributory in respect of the 100 shares (*t*).

Bankrupt's Assignees.—A contributory becoming bankrupt before or after he has been placed on the list of contributories, his assignees will be the contributories, and may be called upon to admit proofs against his estate, or to allow payments out of his assets, in due course of law of any monies due from the bankrupt in respect of his liability to contribute, and calls may be proved against his estate (*u*).

Directors.—Directors acting without the necessary qualification in respect of shares prescribed by the memorandum or articles of association will not make them contributories in respect of such shares, unless they have agreed to accept the same.

A. was nominated a director of a company, the articles of association of which provided that no person should be eligible as a director, unless he held in his own right fifty

(*t*) *Bloxam, Ex parte*, 33 L. J., Chanc. 519; affirmed on appeal, 33 L. J., Chanc. 574—L. J.

(*u*) 25 & 26 Vict. c. 89, s. 77 and s. 75.

shares. By the memorandum of association, which he had signed, he had agreed to take twenty-five shares only; he afterwards signed the articles themselves: it was held that though a director, he was not liable as a contributory for more than the twenty-five shares which he had agreed to take (*x*).

In the case of a director of a bank who holds out inducements to parties to trust their money with the bank, by representations that the bank is solvent, does not make himself liable as a contributory, on the ground of his having made such representations (*y*).

Executors and Administrators.—On the death of a contributory either before or after being placed on the list of contributories, his personal representatives, heirs and devisees will be liable in due course of administration to contribution, and his personal representatives, heirs and devisees will be the contributories (*z*).

Anne Hall, being an owner of thirty shares, regularly entered in her name in the books of a banking company, bequeathed them to her daughter and her son, making the son and Mr. Crossfield joint executors; the latter never took an active part in the executorship; but he proved the will, and acted as executor, thus becoming, in all respects, liable as an executor. An entry of the probate of the will was duly made in the books of the company, giving the executors a right to deal with the shares, according to the provisions of the deed constituting the company; the shares were entered in the names of R. Hall, (the son of the testatrix,) and J. Crossfield, as executors. No communications ever took place between the latter and the company, relative to the shares; the son received the dividends, and corresponded with the company on the subject of the shares: the son sold some of them, and received the

(*x*) *Ex parte Roney*, 33 L. J., Chanc. 731.

(*y*) *Ex parte Cotterell*, 32 L. J., Chanc. 66.

(*z*) 25 & 26 Vict. c. 89, s. 76.

dividends on the remainder. More than nine years after the death of Anne Hall the company failed.

The question was, whether Crossfield was liable for the debts of the company, in respect of these shares, and it was held that he was (a). There was in the deed of settlement a covenant by each shareholder—binding his real and personal representatives, that he would continue liable in respect of any shares, that formed part of his assets. The reason for the insertion of such a clause was this—the executors, *quà* executors, not becoming members, and not having sold the shares, would not themselves be responsible personally, and until they sold the shares, and other persons came in their place, there would be no *personal* responsibility.

Generally the rule is, that executors holding shares merely as such, and *never having taken to them* as beneficial holders, are only liable to the extent of the assets of those whom they represent: the liability is that of the estates of the original holders (b).

By the deed of settlement of a banking company established under the 7 Geo IV. c. 46, personal representatives of deceased shareholders might become shareholders on giving certain notices. A shareholder died, having appointed T. his executrix. She never gave the prescribed notices or received any dividends in respect of the shares, but always repudiated all interest in the concerns of the company. The testator's personal estate did not amount to 20*l.*, and had been altogether exhausted in the payment of his debts; T.'s name, *as executrix*, was held to have been properly placed on the list of contributories (c).

By the deed of settlement of a banking company certain formalities were prescribed, by which, on a transfer of shares, the transferee was to become a member of the company; A. became the owner of shares by transfer, and

(a) *Crossfield's Case*, 2 De G., Mac. & G. 128.

(b) *Evans v. Coventry*, 25 L. J., Chanc. 499.

(c) *Thomas's Case*, 1 De G. & S. 579; 18 L. J., Chanc. 249.

treated himself, and was treated by the directors as a shareholder; all the formalities of the deed were not, however, observed in the transaction; A. having died, his executors, every matter of substance having been complied with, were held liable as contributories, in respect of such shares (*d*).

In a banking company, A. was holder of eighty shares at his death in 1842; A.'s executrix produced the probate of his will; and for more than three years received the dividends, giving receipts for the same, as executrix, except the first, which was signed by her in her own name, without any addition.

By the deed of settlement it was provided, that until certain acts were done, constituting the executor of a deceased member, or the purchaser of such member's shares, a partner in the company, the estate of the deceased member should remain liable.

The company returned the shares in the register list, as shares held by A.'s executrix. There was nothing further to show that she had constituted herself a member. The ground on which it was sought to make the executrix liable as a contributory was furnished by the provisions of the deed, one of which made each shareholder liable to the losses of the company in proportion to his shares; the other amounted to a covenant by the shareholder executing the deed, that his executor should remain liable, while the shares continued part of his estate, and Lord Truro held, accordingly, that the executrix was liable, though by reason of her not having observed the requirements of the deed, she was liable not as a member but in her representative character (*e*).

D., in 1844, bought shares in a banking company and had them transferred to him. The company afterwards registered under the 20 & 21 Vict. c. 49, for the purpose

(*d*) *Ex parte Straffon*, 1 De G., Mac. & G. 576; 22 L. J., Chanc. 194.

(*e*) *Gouthwaite's Case*, 3 Mac. & G. 187; 20 L. J., Chanc. 187.

of being wound up. He was never entered on the list of shareholders under that act, but he had received dividends, and after his death his executors received dividends, and then sold the shares: it was held that as he would have been a contributory under the old acts, so his executors were contributories (*f*).

So, a similar case, where Mrs. C. was a holder of shares in a banking company, established in 1836, by a deed of settlement. She bequeathed these shares to B. whom she appointed her executrix. The deed of settlement provided that executors and legatees should become shareholders and receive dividends only upon executing a deed making themselves personally liable. B., without executing any deed, received six dividends, and, with the exception of the two last, signed the receipts, as executrix. The company, without the knowledge of the executrix, returned her name to the stamp officer as a shareholder, and about four years after Mrs. C.'s death entered it on the dividend list, in lieu of Mrs. C.'s name. Upon the company being wound up, it was held that B. was liable as a contributory only in her representative character (*g*).

Females marrying.—A female marrying either before or after being placed on the list of contributories, her husband will during the marriage be liable to contribute the same sum as she would have been liable to contribute had she not married, and he will be deemed the contributory (*h*).

A female shareholder in a banking company married without any settlement having been made, and her husband received the dividends and signed the receipts "*pro A. B.*" The company's deed contained clauses by which husbands of female shareholders were required to do certain acts if they claimed to be shareholders, and without doing which they could not receive any dividends in their own right.

(*f*) *Dixon's Case*, 1 Drew. & S. 225.

(*g*) *Ex parte Bulmer*, 33 L. J., Chanc. 609.

(*h*) 25 & 26 Vict. c. 89, s. 78.

The husband did not perform any of these acts. His name was put on the list of contributories, and it was held that his name ought to be on the list, either alone or with that of his wife (*i*).

Mrs. L. was before her marriage the registered proprietor of shares in a banking company. Upon her marriage a settlement was executed, under which the shares were assigned to trustees, upon trusts excluding her husband, but the trustees did not accept the trusts, and the shares continued registered in her maiden name. The company was afterwards registered under the 20 & 21 Vict. c. 49, and on winding-up in 1859, it was held that the name of the husband in right of his wife was properly placed on the list of contributories as well as that of the wife (*j*). It may be doubtful whether the name of the wife may be necessary to be added to the list, since the statute has declared that the husband shall be deemed to be a contributory.

Infants.—A father voluntarily transferring shares to his son, an infant, will be a contributory and not the son (*k*). But where a father applied for shares in the name of his son and paid a deposit, but the company refusing to allow the father to execute the deed on behalf of the son, and nothing further having been done, it was held that the father was not a contributory (*l*).

Legatees.—A deed of settlement forbade any share being transferred on which a call was due and unpaid, and transfers made contrary to the deed were declared to be void. A legatee of shares on which a call was due took a transfer of them from the executors by a deed to which an officer of the company was a party: the legatee applied for the dividends, but was refused, until the call was paid; this

(*i*) *Burlington's Case*, 3 De G. & S. 18; 18 L. J., Chanc. 250.

(*j*) *Luard's Case*, 1 De G., F. & J. 533; 29 L. J., Bank. 269.

(*k*) *Reid, In re*, 24 Beav. 318.

(*l*) *Maxwell, In re*, 24 Beav. 321.

was never done; the legatee afterwards married, neither she nor her husband, either paying or receiving anything in respect of the shares. Nine years afterwards the husband was held liable as a contributory (*m*).

A widow, who was entitled as executrix and residuary legatee of her deceased husband to shares in a banking company, executed a deed, which professed to assign, but she did not actually transfer them to a trustee, previously to marrying again. The trustee omitted to comply with the deed of settlement in respect of the forms to be observed by an assignee of shares, but received the dividends, sometimes signing the receipts for the executors, sometimes by procuration of the testator; once, as trustee of the widow, by her widow's name, by which she continued to be called in the company's books, (where the shares stood in her name, as widow,) and in the registry and returns.

This was held to be one of the cases in which the formalities required by the deed of settlement had been waived on both sides, and the trustee was considered to be liable to have his name placed on the list of contributories, the liability not to extend further than the date of the deed of assignment (*n*).

Lord Cottenham, C., however, reversed this decision, declining to hold the trustee liable as a contributory, without more evidence than the above facts, to show that he had in any way connected himself with the company (*o*).

Principals and Agents.—A party will not be a contributory who signs the articles of association by an agent, and not by his own hand, unless possibly the agent is authorized by deed to sign them on behalf of his princi-

(*m*) *Sadler's Case*, 3 De G. & S. 36; 18 L. J., Chanc. 251.

(*n*) *Hall's Case*, 3 De G. & S. 84.

(*o*) *Ex parte Hall*, 1 Mac. & G. 307. Leave was given to take proceedings at law to ascertain Hall's liability to pay the debts and obligations of the company, but nothing appears to have been done in the matter.

pal (*n*). A person taking shares, though intending to do so as an agent only for another, will be personally liable as a contributory, unless he states at the time that he accepts only as agent (*o*).

Purchasers.—There may be a contract *in præsenti* to take shares, where the day fixed for payment of the shares is future, and the certificates will not be delivered until that day (*p*). Therefore, where a shareholder in a banking company, on the proposed issue of reserved shares in June, 1864, applied for and was then allotted one share in respect of every five shares he already held, and fourteen shares besides. The reserved shares so allotted were not to be delivered, or the money paid for them, until the 1st of October. In September, and before the delivery of the certificates, the bank stopped payment; it was held that the shareholder must be put on the list of contributories in respect of the reserved shares (*p*).

Where A. bought through a broker one hundred shares in one parcel, and paid the purchase-money, 300*l.*, to him; the shares belonged to B. and C., each owning fifty. A. was accepted as transferee by the directors, and his name duly entered in the company's books, as proprietor of one hundred shares, and he received certificates to the same effect; B., by deed of the 19th of December, 1846, duly transferred to A. five shares; no transfer of the other ninety-five shares was ever executed; the company stopped payment on the 6th of March, 1847, before A. had executed the deed of settlement, and before he had received any dividend. The directors made a call of 5*l.* a share, upon which A. paid 500*l.* on the 30th of November, 1848. On the winding-up of the company another call of 30*l.* a share was made, and A. paid a further sum of 2,500*l.* in respect of his shares, being allowed as part thereof the former sum of 500*l.* paid as the directors' call; on the 30th

(*n*) *Richardson, Ex parte*, 4 L. T., N. S. 589.

(*o*) *Bird, Ex parte*, 33 L. J., Bank. 49.

(*p*) *Barrett's Case*, 11 Jur., N. S. 234; 13 W. R. 541.

of June, 1849, A. received notice of a further call of 20*l.* per share.

In the deed of transfer of the five shares, A. had covenanted with the vendor, and also with the public officer of the company, to pay all instalments and sums of money due or to become due in respect of the five shares.

This covenant, it was held, must govern the whole; the one hundred shares forming the subject of a single contract. The covenant operated to throw the entire liability, both past and present, from the vendor upon the purchaser, and the purchaser therefore was liable as a contributory for the one hundred shares (*q*).

A person who has entered into a contract for the purchase of shares from a company, which has been approved by the company, and of which a specific performance could have been enforced against him, will be liable as a contributory, although no complete or formal transfer of the shares, according to the deed of settlement, has been made before the company stopped payment (*r*).

Purchasers by means of Misrepresentation.—Persons induced to purchase shares in a banking company, through the false statements of the directors or on the faith of reports of its flourishing financial condition, which are untrue, cannot repudiate their liability as contributories without showing that the statements and reports were circulated by the authority of the company, and that the shares were sold by or on the behalf of the company (*s*).

Where the directors of a banking company from time to time made at the general meetings of shareholders, and printed and published false and fraudulent reports of the affairs of the company, and there was nothing to show that the shareholders were aware or knew of the falsehood

(*q*) *Dodgson's Case*, 3 De G. & S. 85.

(*r*) *Sanderson's Case*, 3 De G. & S. 66; 19 L. J., Chanc. 122.

(*s*) *Conybeare's Case*, 9 H. L. Cas. 711; *In re Leeds Banking Company*, *Barrett's Case*, 11 Jur., N. S. 234; 13 W. R. 541; *Ginger's Case*, 5 Ir. Chanc. Rep. 174.

of these reports, and an issue of new shares having been made, a person was induced by these reports to take some of these shares, it was held, notwithstanding the fraud, that he was liable to be placed on the list of contributories (*t*).

So where a purchaser had been induced to take shares in a banking company by false and fraudulent representations as to its financial position, and it appeared that these representations were partly made by one of the directors and were partly contained in a report which was made by the directors to the company, and approved of at an annual general meeting, and afterwards embodied in a circular issued by the directors, inviting subscriptions for new shares: it was held, that the company could not be considered to have authorized such a use of the report, or to be answerable for the misrepresentations contained in it; and that whether they could or not, the purchaser, having had the means of discovering the fraud, and having taken no steps to repudiate the contract before the winding-up of the company, but having received dividends on and made a transfer of the shares, was not entitled to be relieved from the contract, but must be considered to have been a shareholder down to the time of the transfer (*u*).

If a shareholder is induced to take additional or reserved shares in a bank upon the faith of the statements contained in the report made by the directors and adopted at an annual meeting of the shareholders, and afterwards sent to him and others, he will not be liberated from being a contributory in respect of such shares, on the representations of the report turning out to be false (*v*). So if a person is induced to sign the memorandum and articles of association by a promise to make him the company's broker, which promise is never fulfilled, he will be a contributory, and his remedy, if he was deceived in the taking of the

(*t*) *Mixer's Case*, 4 De G. & J. 575; 28 L. J., Chanc. 879.

(*u*) *Nicol's Case*, 3 De G. & J. 387; 28 L. J., Chanc. 257.

(*v*) *Barrett's Case*, 11 Jur., N. S. 234; 13 W. R. 541.

shares, will be against those who deceived him, and not against the company (*x*).

Scripholders.—Mere holders of scrip will not be liable as contributories (*y*). Therefore, where London bankers had in their hands, at the date of the winding-up order, shares belonging to their foreign correspondents, on which they were in the habit of receiving the dividends, they were held not to be contributories. But a scripholder may obtain a winding-up order if he will make himself a shareholder, and do all other acts that are necessary to constitute him a contributory (*y*).

Trustee and Cestui que Trust.—An executor, for a nominal consideration, transferred shares in a banking company to a *cestui que trust* under the will, in order to enable him to become a director: it was held that the transfer was good, and the transferee liable as a contributory (*z*).

List of Contributories.—As soon as practicable after the order for winding-up has been made, the official liquidator settles the list of the contributories (*a*). In settling this list a distinction must be made between persons contributories in their own right and persons who are representatives of others or liable for their debts (*b*).

In the case of a personal representative of a deceased contributory being placed on the list, it will not be necessary to add his heirs or devisees. The heirs or devisees may, however, be added as and when the Court may think fit (*b*).

On a voluntary winding-up the liquidator appointed by the company has similar powers of settling the list, and the list will be *primâ facie* evidence of the liability of the per-

(*x*) *Felgate's Case*, 13 W. R. 305; 11 L. T., N. S. 613.

(*y*) *Ex parte Finlay*, 26 Beav. 182; 27 L. J., Chanc. 664.

(*z*) *Bigge, Ex parte*, 28 L. J., Chanc. 50.

(*a*) 25 & 26 Vict. c. 89, s. 98; Can. Ord. rr. 29, 30, 31.

(*b*) *Id.* s. 99.

sons named therein as contributories (c). Persons dissatisfied with the insertion of their names on the list may appeal (d).

Rectifying Register on settling List.—On settling the list of contributories the Court has likewise power to rectify the register of the members of the company, under the 25 & 26 Vict. c. 89, s. 39 (e), whenever parties have been improperly entered or omitted (f). The name of a contributory was ordered to be struck off the register of members in a recent case (g), which, on account of its general importance and interest, is detailed at length with the reported decision of Vice-Chancellor Wood :—

It appeared that a prospectus of a proposed bank, entitled the Scottish and Universal Finance Bank (Limited), had been forwarded to a Mr. Ship by one of the directors. The objects of the company, as stated in this prospectus, were general banking purposes, and the purchase, importation, and exportation of bullion and specie in all forms. On the 28th of May, 1864, Mr. Ship signed an application for fifty shares in the form annexed to the prospectus, and paid 250*l.* upon them, his name being inserted in the register for fifty shares. The company was incorporated on the 1st of June, 1864, under articles of association, in many respects differing from and materially extending the objects mentioned in the prospectus, on the faith of which Mr. Ship had taken his shares. Among other objects of the company, as stated in these articles, were the obtaining concessions for the construction of railways and other works, and the leasing or working such undertakings, and (clause 10) “generally to transact any

(c) 25 & 26 Vict. c. 89, s. 133 (9).

(d) *Id.* s. 124.

(e) See *ante*, p. 476, where the provision is stated.

(f) 25 & 26 Vict. c. 89, s. 98.

(g) *Ship's Case*, 13 W. R. 450; 11 L. T., N. S. 43. It is right to add that an appeal is at present pending before the Lords Justices against this decision. See 13 W. R. 531; 11 Jur., N. S. 254, March 17, 1865.

business of bankers, bullion and exchange bankers, and of a merchant, contractor, and capitalist, as principal or agent, in any part of the world which may not in the articles of association or by special resolution of the company be prohibited." The company, thus incorporated on the 1st of June, with a capital 1,000,000*l.*, with power to increase to 5,000,000*l.*, and with so grand a field of operations, had but a short existence, as it was in difficulties by December and in course of winding-up. The articles under which the company was incorporated had never been sent to Mr. Ship, who applied to have his name removed from the register, on the ground that the company incorporated was entirely different from that in which he had applied for shares. The application was opposed by the official liquidator.

Wood, V.-C., held that Mr. Ship's name must be removed from the register. Being invited by the prospectus to become a partner in a company about to be incorporated for the purpose of carrying on banking business, he sent up an authority for the allotment of shares to himself. His name was registered as a member of a company for purposes as totally different from those stated in the prospectus on the faith of which he took his shares as if, having intended to take shares in a railway company, he had found himself a member in a steam-packet company. It was quite true that banking operations were very wide; but, looking at the terms of clause 10 of the articles of association, and the absence of anything of the kind in the prospectus, it was really difficult to understand how any persons having characters to lose could have thought themselves authorized in taking such a course as the directors of this company had taken. With respect to the company, therefore, the attempt to retain Mr. Ship's name upon the register was quite hopeless. It was said, however, that as regarded the creditors who were represented by the official liquidator the case was different, and that as Mr. Ship had given an authority for the allotment of

shares in general terms, and had allowed his name to remain on the register, he, and not the creditors of the company, ought to bear the consequences. But the creditors must be taken to be cognizant of the circumstances. Mr. Ship had not signed his name as a subscriber to any undertaking whatever that the directors might choose to establish, but as a subscriber to a bank with a given field of operation. The creditors when they saw that this breach of confidence had been committed, or rather that the authority given by Mr. Ship had been totally exceeded, were equally in the wrong with the proprietors, and could not insist upon retaining his name upon the register. The name must therefore be struck out, and the costs paid by the company (*g*).

Proof of Debts.—For the purpose of ascertaining the debts of the company, the creditors are called upon, by the official liquidator, to come in and prove their debts or claims against the company (*h*).

Making Calls on Contributories.—The Court of Chancery is empowered to make calls on the contributories settled on the list to the extent of their liability, for payment of the debts of the company and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves, and in making a call the Court may take into consideration the probability that some of the contributories (*i*) may fail to pay their proportions. A liquidator under a voluntary winding-up has similar powers (*j*). In making an order for payment of a call on a contributory, or on the estate of a deceased contributory, when the company is not limited, the contributory may be allowed by way of set-off any moneys due to him, or the estate which he represents, from

(*g*) See note (*g*), *ante*, p. 582.

(*h*) 25 & 26 Vict. c. 89, s. 158; Can. Ord. rr. 20—28.

(*i*) *Id.* s. 102.

(*j*) *Id.* s. 133 (9).

the company on any independent dealings or contracts with the company, but not money due to him as a member in respect of any dividends or profits (*k*). But when all the creditors of the company, whether limited or unlimited, have been paid in full, moneys due on any account whatever to any contributory from the company may be set off against any subsequent call or calls (*l*). An order for a call is conclusive evidence that the call is due, and all other pertinent matters stated in the order are to be taken to be truly stated as against all persons (*m*), with the exception of proceedings taken against the real estate of a deceased contributory, when the order will be only *primâ facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time when the order was made (*m*). A right of appeal is however given against any order that may be made or that is sought to be enforced against a contributory or his representatives (*n*).

Nature of Liability.—Calls made on the winding-up of a banking company, formed under the Act of 1862, will create a specialty debt due from the contributory, and will be payable in priority to all his simple contract debts. But calls made on the winding-up of banking copartnerships, established under the 7 Geo. IV. c. 46, were determined not to be specialty debts (*o*), although calls made by the copartnerships themselves created specialty debts (*p*).

Extent of Liability.—A transferee of shares in a banking company, established under the 7 Geo. IV. c. 46, was held liable as a contributory in respect of debts contracted as well before as after the transfer, there being no provisions

(*k*) 25 & 26 Vict. c. 89, s. 101 and sect. 38, (7).

(*l*) *Id.* s. 101.

(*m*) *Id.* s. 106.

(*n*) *Id.* s. 124.

(*o*) *Ex parte Robinson*, 6 De G., Mac. & G. 572; 26 L. J., Chanc. 95.

(*p*) *Heward v. Wheatley*, 22 L. J., Chanc. 435.

in the deed of settlement of the company in any way limiting such liability (*q*).

So where the name of a person who had purchased shares in a similar banking company was after its stoppage placed on the list of contributories, but only from the date at which he made the purchase, this qualification of his liability was struck out on appeal (*r*). The extent and qualifications of liability attaching to members of limited banking companies as contributories have already been pointed out in this chapter.

Enforcing Calls.—The mode by which calls are enforceable is by the service of the summons of the order for the call on the contributories, or their representatives, requiring payment to be made to the official liquidator of the amount therein mentioned and at a specified time, which if not complied with, an attachment or a sequestration according to the practice of the Court may be issued against the defaulters (*s*). In the case of a voluntary winding-up, application must be made by the liquidator to the Court for its aid to enforce calls (*t*).

If the representative of a deceased contributory makes default in paying a call, proceedings may be taken for administering either his personal or real estate and of compelling payment thereout of the calls (*u*).¹

A contributory may be arrested upon proof of probable cause being given to the Court, either before or after making the winding-up order, of his intention to quit or abscond from the United Kingdom for the purpose of evading payment of calls (*v*). An order for the payment of calls made in England may be enforced in Ireland or Scotland against contributories (*w*).

(*q*) *Cape, Ex parte*, 2 De G., Mac. & G. 562; 22 L. J., Chanc. 601.

(*r*) *Henderson v. Henderson*, 3 H. L. Cas. 698.

(*s*) 25 & 26 Vict. c. 89, s. 101, Ord. Can. r. 35, and Forms 38, 39, 42.

(*t*) *Id.* s. 138.

(*u*) *Id.* s. 105.

(*v*) *Id.* s. 118.

(*w*) *Id.* ss. 122, 123.

Dissolution on Winding-up.—In the case of a compulsory winding-up, a company will be deemed to be dissolved, when its affairs have been completely wound up, and an order has been obtained from the Court of Chancery dissolving the company (*x*). The official liquidator must report the order to the registrar who will make a minute in his books of the dissolution of the company (*y*). Should he fail in reporting the order, he will incur a penalty not exceeding 5*l.* for each day of delay (*z*). In the case of a voluntary winding-up, as soon as the affairs of the company have been fully wound up, the liquidators must make up an account showing the manner in which the winding-up has been conducted, and the property of the company disposed of (*a*); and the liquidators are then to call a general meeting of the company for the purpose of laying this account before the meeting, and hearing their explanations (*a*). The liquidators are afterwards to make a return of the holding of the meeting to the registrar, and, on the expiration of three months from the date of the registration of this return, the company will be deemed to have been dissolved (*b*). If the liquidators fail to make the return, they will incur a penalty not exceeding 5*l.* for every day of default (*b*).

Other Modes of winding-up.—Independently of the procedure provided by the Act of 1862 for winding-up and dissolving a banking company, there is another mode which it may be useful to mention. It is usual for promoters to state in their prospectus, that they reserve to themselves the right of returning the deposits, with or without certain deductions for preliminary expenses, should the proposed capital not be subscribed, or from any other event the project should fail in their opinion. This being

(*x*) 25 & 26 Vict. c. 89, s. 111; and see form of Order, No. 56, Can. Ord., 11th Nov. 1862.

(*y*) 25 & 26 Vict. c. 89, s. 112.

(*z*) *Id.* s. 113.

(*a*) *Id.* s. 142.

(*b*) *Id.* s. 143.

a legal stipulation is binding upon all parties and is illustrated by the following case (c) :—

The directors of a projected bank, not being able to carry out the project to its full extent, determined upon winding-up and returning the deposits. Deposits amounting in the whole to two-thirds of the subscriptions had been returned, and the remainder was in course of liquidation. A bill was filed by purchasers of shares or intended shares who were dissatisfied with the termination of the proposed bank; and it was held, that the directors were justified in the course they had taken, it being morally impossible that the project could have been carried out in its integrity from the events which had happened (c).

Colonial Banks.—The Royal Bank of Australia was wound up in Chancery under the Acts of 1848 and 1849; the petitioner for the winding-up order, a shareholder in the Bank, being described in his petition as of a place out of the jurisdiction, was ordered to give security for costs before his petition could be heard; and proceedings taken in Scotland against the petitioner, in respect of a debt due from the company, were held to furnish proper ground for a winding-up on his petition (d).

But the Court of Chancery refused to make an order winding-up the Union Bank of Calcutta, established in India in 1829, on the ground that substantial justice could not be done in this country (e).

(c) *Bank of Switzerland v. Bank of Turkey*, 5 L. T., N. S. 549.

(d) *Ex parte Latta*, 3 De G. & S. 186.

(e) *Watson's Case*, 3 De G. & S. 253.

APPENDIX.

BANK NOTES ISSUE BILL.

[AS AMENDED IN COMMITTEE.]

*Ordered to be printed by the House of Commons, 17th March, 1865.**Arrangement of Clauses.*

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A Bill (as amended in Committee) to make Provision for empowering Country Banks of Issue to obtain Relief from certain Restrictions upon Payment from Time to Time of a certain Charge in respect thereof.

WHEREAS divers restrictions are imposed by act of parliament on bankers in England issuing their own bank notes: and whereas it is expedient to permit the said bankers to exempt themselves from the said restrictions by payment of such percentage on their issues of notes as is hereinafter mentioned: be it enacted [&c.] as follows:

Preamble.

Preliminary.

1. This act may be cited for all purposes as "The Country Banks of Issue Act, 1865."

Short title of Act.

Application
of act.

2. This act shall not extend to Scotland or Ireland.

Construc-
tion of act.

3. This act, and the act 7 & 8 Vict. c. 32, intituled "An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period," and which act is hereinafter referred to as the Bank Act, 1844, shall be read as one act, so far as is consistent with the terms of such acts respectively.

Definitions.

4. "Bank of England" shall mean the governor and company of the Bank of England :

"Bank of Issue" shall mean any banker in England, as defined by the Bank Act, 1844, lawfully issuing his own bank notes at the time of the passing of this act.

Power of
banks of
issue to ob-
tain exemp-
tions.

5. There shall be repealed, so far as respects any bank of issue undertaking to pay such per-centage on its issue of bank notes as is hereinafter mentioned, any provision of any act of parliament whereby the number of partners in certain banks of issue is restricted to six, or whereby certain banks of issue are prohibited from having a house of business or establishment as bankers in London, or at any place not exceeding 65 miles from London, or whereby banks of issue are prohibited from making payable bank notes in London or at any place not exceeding the distance of 65 miles from London.

Power to
transfer
rights of
issue.

6. Any bank of issue or any number of banks of issue may transfer to any other bank of issue the right of issue or rights of issue vested in it or them, or any part or parts thereof, on such last-mentioned bank undertaking to pay such per-centage in respect of its own issue and of the issue or issues so transferred as is hereinafter mentioned; and such last-mentioned bank shall be entitled to the same privileges in respect of the issue of notes and all other matters as the bank or all the banks from whom the right or rights of issue is or are derived would have been entitled to if it or they had continued such issue or issues on an undertaking to pay the said per-centage in accordance with this act.

Saving privi-
leges of
banks on
change in
constitution.

7. No change in the personal composition of any bank that has accepted the conditions of this act in respect of the payment of a per-centage on its issue of notes, and no alteration in the constitution thereof made in accordance with law, shall affect or prejudice the exercise by such bank of the rights and privileges conferred on it by this act.

Issue of
banks ac-
cepting con-

8. Any bank issuing notes in respect of which such per-centage as aforesaid is payable may continue its issue until the

1st of January, 1875, and no longer. In the event of parliament putting an end to the issues authorized by this section at any time before the 1st of January, 1875, there shall be paid to any bank for the time being enjoying the right to such issue full compensation for any loss it may sustain by the determination of that right before such time as aforesaid.

ditions of
Act to con-
tinue till 1st
January,
1875.

9. The undertaking of a bank for the purposes of this act shall be by bond to her majesty, her heirs and successors, in such sum, conditioned in such manner and generally in such form, as may be prescribed by the Commissioners of Inland Revenue, with the sanction of the treasury. It shall be executed by the bank or the public officer thereof, or such or so many of the directors or managers thereof or partners therein, or all or any of the said parties, as the commissioners, with such sanction as aforesaid, think fit to make obligors. The commissioners, when they have approved of the undertaking of a bank, shall forthwith publish in the London Gazette notice of such bank having entered into such an undertaking; and a copy of the Gazette containing such notice shall for all purposes be conclusive evidence of the fact therein stated, and the said undertaking shall be deemed to take effect from the date of the publication of the notice in the Gazette.

Undertak-
ing of banks
accepting
conditions of
Act.

10. Every bank that has accepted the conditions of this act in respect of the payment of a per-centage on its issue of notes, and which bank is hereinafter referred to as a privileged bank, shall pay into the receipt of her majesty's exchequer a sum after the rate of 1*l.* 5*s.* by the year upon every 100*l.* of the average amount of bank notes circulated by that bank in every half-year.

Per-centage
payable in
respect of
issue of
notes.

For the purposes of this section, the average amount of bank notes circulated during any half-year by any bank shall be calculated upon the monthly averages as ascertained by the Commissioners of Inland Revenue under the Bank Act, 1844.

The per-centage payable under this section shall be instead of licence duty and stamp duty or composition for stamp duty in respect of bank notes issued by a privileged bank, and no licence to issue notes shall be required by any bank paying the same, and such bank shall be entitled to the same privileges in respect of the issue of bank notes as if it were duly licensed and had duly paid stamp duty or composition for stamp duty.

The said per-centage shall be paid half-yearly to the Receiver General of Inland Revenue on or within one week after the 30th of June and the 31st of December in every year. The first payment shall be made on or within one week after the first of the said half-yearly days that succeeds the publication in the Gazette of the notice of the undertaking to pay the same,

and shall consist of the proportion only that may have accrued due up to the said day.

Renewal of
undertaking
by banks.

11. An undertaking by bond given by or on behalf of a bank in pursuance of this act shall be renewed from time to time as the Commissioners of Inland Revenue, with such sanction as aforesaid, may require; and if any privileged bank refuses or neglects to renew any such bond, after being required so to do by notice in writing given by or on behalf of the Commissioners of Inland Revenue, such bank shall incur a penalty not exceeding 100*l.*, to be recovered by action in one of her majesty's superior courts, and on being convicted shall forfeit to the Crown all its rights of issue.

Certificate of
Commis-
sioners of
Inland Re-
venue.

12. The Commissioners of Inland Revenue shall from time to time, on the application of any privileged bank, certify to that bank the amount of notes which it is entitled to issue; they shall also, at the expense of the bank, publish a duplicate certificate in the next succeeding London Gazette in which the same can be conveniently inserted; and a copy of the Gazette in which such publication is made shall be conclusive evidence of the amount of notes which that bank is authorized to issue.

Determina-
tion of issue
on bank-
ruptcy.

13. If any privileged bank become bankrupt its right of issuing notes shall absolutely determine.

Penalty on
assuming
rights of a
privileged
bank.

14. If any bank of issue assume to act as a privileged bank without having complied with the provisions of this act entitling it to do so, the right of issue vested in that bank shall be forfeited to the crown, and may be disposed of either by being altogether extinguished, or by being transferred to another bank, as to the treasury may seem good.

Saving to
privileged
banks of
power to
compound
for certain
duties.

15. A privileged bank, notwithstanding it carries on business in London or within 65 miles thereof, may, on obtaining a licence or licences as required by the 9 Geo. 4, c. 23, as amended by the Bank Act, 1844, compound for the issue on unstamped paper of its promissory notes payable to order at any period not exceeding seven days after sight, and of such bills of exchange as are in the 9 Geo. 4, c. 23, in that behalf mentioned, although they are drawn on and made payable at such bank, or a branch thereof in London, Westminster, or the borough of Southwark, and further shall be entitled to all powers and privileges exercised or enjoyed by it previously to its becoming a privileged bank.

Composition
by Bank of
England.

16. The Bank of England may compound, in manner provided by the Bank Act, 1844, with any privileged bank, in the

same manner as it is thereby empowered to compound with banks of issue that are not privileged; but no bank that has transferred its right of issue to another bank shall be deemed to have relinquished the privilege of issuing its own notes so as to entitle it to any compensation under the said Bank Act.

17. Nothing in this act contained shall authorize any bank of issue to issue or re-issue bank notes within the city of London or three miles thereof, and no bank of issue that has not at the time of the passing of this act power to issue its bank notes within 65 miles of London shall, by virtue of this act, or any transfer obtained in pursuance thereof, acquire any power of issuing or re-issuing bank notes within that distance.

Saving
clause as to
issue of
notes.

18. A privileged bank of issue shall be subject to all the provisions of the acts of parliament relating to banks of issue, except in so far as they are repealed by this act in relation to such bank.

General
saving
clause.

NOTICES OF AMENDMENT.

The following Notices of Amendment have been given on going into Committee on the Bill after the Easter Recess, 1865, by

Mr. Hubbard,—

Leave out clause 5, and insert the following clause :—
(Repeal of provisions of certain acts.)

There shall be repealed any provisions of any act of parliament prohibiting banks of issue from having an establishment in London, or at any place not exceeding 65 miles from London.

Leave out clauses 6 to 17.

Mr. Alderman Salomons,—

To move the following clause :—

(Deposit of government securities by banks of issue.)

Provided always, that, previous to any bank of issue having a house of business or establishment as bankers in London, or at any place not exceeding 65 miles from London, such bank shall deposit with the Commissioners of the National Debt an amount of exchequer bills or other government securities equal to its maximum authorized

issue, to be retained by the said commissioners so long as such bank shall continue a bank of issue with a house of business or establishment in London, or within 65 miles thereof.

STATEMENT OF REASONS FOR THE BILL.

The following is a Statement of the Reasons on which the above Bill of the Chancellor of the Exchequer was founded:—

“The object of the foregoing Bill is to remove an anomaly in the law, which has the effect of imposing upon joint-stock banks of issue in England an unnecessary restriction, which is productive of much public inconvenience.

“Until the year 1826 the Bank of England was the only joint-stock bank in England, and doubts seem to have been entertained whether any other corporation or copartnership of more than six persons could lawfully carry on business as bankers in England. But such doubts were removed in 1833 by the 3d section of the Act of the 3d & 4th of William IV., cap. 98, which declared the law to be that any partnership consisting of more than six persons might carry on the business of banking in London, or within sixty-five miles thereof, provided such partnership did not take up money on notes payable on demand, or at less time than six months.

“In consequence of this Act numerous joint-stock banks were established in London and in other parts of England, and the London and County Bank is a well-known instance of a banking copartnership carrying on business in London and having branches throughout England.

“But the old-established joint-stock banks, which were formed under the Act of the 7th of George IV., cap. 46, and retain the power of issuing bank-notes, are still prevented, by the restrictions imposed by that statute, from ‘having any house of business or establishment as bankers in London.’

“This restriction was evidently imposed for the purpose of protecting the exclusive privilege of issuing bank-notes which the Bank of England then possessed. The Act, in granting power to joint-stock banks to issue notes, prohibited the issuing of them at any place within sixty-five miles from London; and it was no doubt with a view of preventing interference with the issues of the Bank of England that the Act also prohibited all such joint-stock banks from having a place of business in London.

“Upon the passing of Sir Robert Peel’s Act, in the year 1844, limiting the issues of the Bank of England and all the then existing joint-stock banks to a fixed amount, and forbidding the establishment of any new joint-stock bank of issue, the reason for the above restriction ceased, for the Bank of England had no longer any interest in

checking the issues of joint-stock banks which the law had limited to the amount of their then circulation, nor any power of increasing its own issues, which the law had also regulated. And, accordingly, the Act (8th and 9th of Victoria, cap. 37), which was passed at the same period for Ireland, did away with the corresponding restriction which had existed there, and enabled joint-stock banks to carry on business in Dublin, and within fifty miles therefrom, as freely as such joint-stock banks could carry on such business beyond fifty miles from Dublin.

“The consequence therefore is that whilst joint-stock banks *of issue* in England are still forbidden to carry on business as bankers in London, the National Bank of Ireland, which is also a bank of issue, is free from any such restriction, and it has not only an establishment in Dublin and in the Irish provinces, but also two establishments as bankers even in London.

“The National Bank of Scotland has also recently opened a bank in London, and the same course will no doubt be followed by other joint-stock banks of issue in Ireland and Scotland.

“It is considered that this anomalous and unfair state of the law demands an immediate remedy.

“It is obvious that it is the result, not of any deliberate intention of the Legislature, but of the law not having been adapted to the gradual alterations which have taken place in the regulations affecting joint-stock banks.

“It is not proposed in any way to alter the existing law as regards the issue of bank-notes, and it will be observed that the Bill expressly provides that nothing therein contained shall enable joint-stock banks to issue or reissue such notes in London. All that is desired is the removal of the restriction imposed by the Act 7th of George IV., cap. 46, preventing joint-stock banks of issue from acting as bankers in London.

“Whatever cause may have existed for this restriction at the time it was imposed, there appears to be now no good reason to justify its continuance. It is obviously for the public convenience that banks having branches in various parts of the country should be allowed to have a head establishment as bankers in London; and a restriction which interferes with the natural course of banking operations by prohibiting this can only be justified by some strong reasons of public policy.

“It is believed that no such reasons can be suggested, and that the restriction leads to nothing but inconvenience to the banks and their customers, by compelling them to conduct their banking operations in London through an agent instead of an establishment of their own.”

BANK RETURNS.

(Ordered to be printed by the House of Commons, 13th Feb. 1865.)

ENGLAND AND WALES.

RETURN of the Names of all BANKS carrying on Business in England and Wales on the 1st day of June, 1864, with the Number of BRANCH BANKS belonging to each; distinguishing Banks of Issue from Banks not of Issue, and Private Banks from Joint Stock Banks.

BANKS OF ISSUE.

PRIVATE BANKS.

Names of Banks.	Number of Branches.
Ashford Bank; Jemmett, Pomfret & Co.	—
Aylesbury Old Bank; Cobb & Co.	2
Baldock and Biggleswade Bank; Wells, Hogge & Co...	3
Banbury Bank; J. C. & A. Gillett	2
Banbury Old Bank; Cobb & Son	1
Barnstaple Bank; Marshall & Co.	—
Basingstoke and Odiham Bank; Seymour, Lamb & Co.	1
Bedford Bank; Barnard & Co.	—
Bedfordshire, Leighton Buzzard Bank; Bassett & Co...	3
Bicester and Oxfordshire Bank; Tubb & Co.	—
Birmingham Bank; Attwoods, Spooner & Co.	—
Birmingham Bank; Lloyds & Co.	—
Boston Bank; Claypons & Co.	6
Boston Bank; Gee & Co.	—
Brecon Old Bank; Wilkins & Co.	7
Bridgwater Bank; J. & J. L. Sealy	—
Brighton Union Bank; Hall & Co.	—
Bristol Bank; Miles, Miles & Co.	—
Broseley and Bridgnorth Bank; Pritchard & Co. ..	1
Buckingham Bank; Bartlett & Co.	3
Burlington and Driffild Bank; Harding & Co. ..	1
Bury and Suffolk Bank, Stowmarket Bank, and Sudbury Bank; Oakes, Bevan & Co.	6
Bury St. Edmunds Bank; Worlledge & Co.	—
Cambridge Bank; Mortlock & Co.	1
Cambridge and Cambridgeshire Bank; Fosters & Co...	4
Canterbury Bank; Hammond & Co.	1
Carmarthen Bank; Morris & Sons	—
Chepstow Old Bank; Snead & Co.	—

Names of Banks.	Number of Branches.
BANKS OF ISSUE: Private Banks—continued.	
Chertsey Bank ; La Coste & Son	—
City Bank, Exeter ; Milford, Snow & Co.	—
Colchester Bank ; Round, Green & Co.	1
Colchester and Essex Bank, Witham and Essex Bank, and Hadleigh Suffolk Bank ; Mills, Bawtree & Co. ..	2
Cornish Bank, Truro ; Tweedy & Co.	2
Coventry Bank ; Little & Woodcock	—
Craven Bank ; Alcocks & Co., Settle	11
Darlington Bank, Durham Bank, and Stockton-on-Tees Bank ; Backhouse & Co.	11
Derby Bank ; W. & S. Evans & Co.	—
Derby Bank ; S. Smith & Co.	—
Derby Old and Scarsdale and High Peak Bank ; Crompton & Co.	1
Devizes and Wiltshire Bank ; Locke & Co.	—
Devonport Bank ; Hodge & Co.	—
Diss Bank ; Fincham & Co.	—
Doncaster Bank and Retford Bank ; Cooke & Co. ..	3
Dorchester Old Bank and Dorsetshire Bank ; Williams & Co.	9
East Cornwall Bank ; Robins, Foster & Co., Liskeard..	3
East Riding Bank ; Bower & Co., Beverley	3
Essex and Bishops Stortford Bank, Chelmsford ; Sparrow & Co.	9
Exeter Bank ; Sanders & Co.	—
Farnham Bank ; Knight & Son	—
Faversham Bank ; Hilton & Co.	—
Godalming Bank ; Mellersh & Co.	—
Grantham Bank ; Hardy & Co.	—
Guildford Bank ; Haydon & Co.	—
Harwich Bank ; Cox, Cobbold & Co.	—
Hertfordshire, Hitchin Bank ; Sharples & Co.	3
Hull Bank and Kingston-upon-Hull Bank ; Smith, Brothers & Co.	—
Huntingdon Town and County Bank ; Veasey & Co. ..	3
Ipswich Bank ; Bacon & Co.	1
Ipswich and Needham Market Bank, Suffolk, Hadleigh Bank, Manningtree and Mistley Bank, and Woodbridge Bank ; Alexanders & Co.	5

Names of Banks.	Number of Branches.
BANKS OF ISSUE: Private Banks— <i>continued.</i>	
Kendal Bank; Wakefield & Co.	4
Kentish Bank, Maidstone; Randall & Co.	—
Kington and Radnorshire Bank; Davies & Co.	1
Knaresborough Old Bank and Ripon Old Bank; Harrison & Co.	3
Leeds Bank; Beckett & Co.	—
Leeds Union Bank; William Williams, Brown & Co.	—
Leicester Bank; T. & T. T. Paget	2
Lewes Old Bank; Whitfeld & Co.	4
Lincoln Bank; Smith, Ellison & Co.	5
Llandovery Bank, Lampeter Bank, and Llandilo Bank; D. Jones & Co.	2
Longton, Staffordshire, Bank; C. Harvey & Sons	—
Loughborough Bank; Middleton, Cradock & Co.	—
Lymington Bank; St. Barbe & Co.	—
Lynn Regis and Lincolnshire Bank; Gurneys & Co.	2
Lynn Regis and Norfolk Bank; Jarvis & Co.	—
Macclesfield Bank; Broklehurst & Co.	—
Manningtree Bank; Nunn & Co.	1
Merionethshire Bank, Dolgelley; Williams & Son	—
Miners' Bank, Truro; Willyams & Co.	1
Monmouth Old Bank; Bromage & Co.	—
Monmouthshire Agricultural and Commercial Bank; Abergavenny; Bailey & Co.	2
Naval Bank, Plymouth; Harris & Co.	—
Newark Bank; Godfrey & Riddell	—
Newark and Sleaford Bank, and Sleaford and Newark Bank; Handley, Peacock & Co.	2
Newbury Bank; Bunny, Slocock & Co.	—
Newmarket Bank; Hammond & Co.	—
New Sarum Bank; Pinckney Brothers	—
Norwich Crown Bank and Norfolk and Suffolk Banks; Harveys and Hudsons	14
Norwich and Norfolk and Fakenham Bank; Gurneys & Co.	7
Nottingham Bank; Smith & Co.	—
Nottingham and Nottinghamshire Bank; Hart, Fellows & Co.	—
Old Bank, Tunbridge, Tunbridge and Tunbridge Wells Old Bank; W. S., A. H., T. and A. T. Beeching	1
Oswestry Old Bank; Croxon, Jones & Co.	—

Names of Banks.	Number of Branches.
BANKS OF ISSUE: Private Banks—continued.	
Oxford Old Bank; Parsons & Co.	—
Oxfordshire, Witney Bank; Clinch & Sons	—
Pease's Old Bank, Hull, Hull Old Bank, and Beverley Bank; Peases, Machell & Co... ..	1
Penzance Bank; Batten & Co.	1
Pembrokeshire Bank, Haverfordwest; J. & W. Walters	1
Reading Bank; Simonds & Co.	3
Reading Bank; Stephens, Blandy & Co.	1
Richmond Bank; Roper & Co.	—
Rochdale Bank; Royds & Co.	—
Rochester, Chatham and Strood Bank; Day, Nicholson & Co.	1
Royston Bank; Fordham & Sons	—
Rugby Bank; Butlin & Son	—
Rye Bank; Pomfret & Co.	1
Saffron Walden and North Essex Bank; Gibsons & Co.	1
Salop Bank, Shrewsbury; Burton, Lloyd & Co. ..	—
Scarborough Old Bank; Woodall & Co.	—
Shrewsbury and Welshpool Bank; Beck, Downward & Co.	1
Shrewsbury Old Bank, and Shrewsbury and Ludlow Bank; Rocke, Eyton & Co.	2
Sittingbourne and Milton Bank; Vallance & Co. ..	—
Southampton and Hampshire Bank; Atherley & Co. ..	—
Southampton Town and Country Bank; Maddison & Co.	—
Southwell Bank; Wylde & Co.	1
Stafford Old Bank; Stevenson & Co.	1
Stamford and Rutland Bank; Eaton, Cayley & Co. ..	2
Taunton Bank; H., R. H., J. & D. Badcock	2
Tavistock Bank; Gill, Sons & Co.	1
Thornbury Bank; Harwood & Co.	—
Thrapston and Kettering Bank; Eland & Co.	1
Tiverton and Devonshire Bank; Dunsford & Co. ..	—
Towcester Old Bank; Mercer & Co.	—
Tring Bank and Chesham Bank; Butcher & Sons ..	2
Union Bank, Cornwall; Helston, Vivian & Co. ..	—
Uxbridge Old Bank; Hull, Smith & Co.	—
Wallingford Bank; Hedges, Wells & Co.	1
Warwick and Warwickshire Bank; Greenway & Co. ..	1

Names of Banks.	Number of Branches.
BANKS OF ISSUE: Private Banks—continued.	
Wellington, Somerset, Bank; Fox, Brothers & Co. ..	—
West Riding Bank, Wakefield and Pontefract Bank; Leatham, Tew & Co.	1
Weymouth Old Bank and Dorchester Bank; Eliot, Pearce & Co.	2
Whitby Old Bank; Simpson, Chapman & Co. ..	1
Winchester, Alresford and Alton Bank; Bulpett & Co.	2
Wirksworth and Ashbourne, Derbyshire, Bank; Ark- wright & Co.	—
Wisbech and Lincolnshire Bank; Gurneys & Co. ..	5
Wiveliscombe Bank; P. & W. Hancock	—
Wolverhampton Bank; R. & W. F. Fryer	—
Worcester Old Bank and Tewkesbury Bank; Berwick, Lechmere & Co.	1
Yarmouth and Suffolk Bank and Halesworth and Suffolk Bank; Gurneys, Birkbeck & Co.	8
Yarmouth, Norfolk and Suffolk Bank; Lacons, Youell & Co.	3
York Bank; Swann, Clough & Co.	—
TOTAL ..	208

JOINT STOCK BANKS:

Bank of Westmorland, Kendal	—
Bank of Whitehaven	1
Barnsley Banking Company	—
Bilston District Banking Company, Wolverhampton ..	—
Bradford Banking Company	—
Bradford Commercial Banking Company	—
Burton, Uttoxeter and Staffordshire Union Bank ..	2
Carlisle and Cumberland Banking Company	3
Carlisle City and District Bank	1
Chesterfield and North Derbyshire Banking Company ..	—
County of Gloucester Banking Company, Cheltenham ..	10
Coventry and Warwickshire Banking Company ..	—
Coventry Union Banking Company	1
Cumberland Union Banking Company, Workington ..	6
Darlington District Joint Stock Banking Company ..	5
Derby and Derbyshire Banking Company	3
Dudley and West Bromwich Banking Company ..	1

Names of Banks.	Number of Branches.
BANKS OF ISSUE: Joint Stock Banks— <i>continued</i> .	
East of England Bank, Norwich —————	12
Gloucestershire Banking Company, Gloucester	11
Halifax Joint Stock Bank	—
Halifax and Huddersfield Union Bank	—
Halifax Commercial Banking Company, Limited ..	1
Helston Banking Company	—
Huddersfield Banking Company	4
Hull Banking Company	3
Knaresborough and Claro Banking Company	8
Lancaster Banking Company	8
Leamington Priors and Warwickshire Banking Company	3
Leeds Banking Company	—
Leicestershire Banking Company, Leicester	7
Lincoln and Lindsey Banking Company	8
Ludlow and Tenbury Bank	—
Moore & Robinson's Nottingham Bank	—
National Provincial Bank of England	119
Northamptonshire Banking Company, Northampton ..	3
Northamptonshire Union Bank, Northampton ..	3
North and South Wales Bank, Liverpool	19
North Wilts Banking Company, Melksham	11
Nottingham and Nottinghamshire Banking Company ..	7
Pare's Leicestershire Banking Company, Leicester ..	4
Saddleworth Banking Company	2
Sheffield Banking Company	2
Sheffield and Hallamshire Banking Company	—
Sheffield and Rotherham Joint Stock Bank	3
Shropshire Banking Company, Shifnal	3
Stamford, Spalding and Boston Banking Company ..	17
Stourbridge and Kidderminster Banking Company ..	10
Stuckey's Banking Company, Langport	29
Swaledale and Wensleydale Banking Company, Richmond, Yorkshire	3
Wakefield and Barnsley Union Bank	2
Warwick and Leamington Banking Company	3
West of England and South Wales District Bank, Bristol	29

Names of Banks.				Number of Branches.
BANKS OF ISSUE : Joint Stock Banks— <i>continued</i> .				
West Riding Union Banking Company, Huddersfield	..	..	..	2
Whitchurch and Ellesmere Banking Company	..	..	..	1
Whitehaven Joint Stock Banking Company	..	..	..	1
Wilts and Dorset Banking Company, Salisbury	..	..	..	26
Wolverhampton and Staffordshire Banking Company	..	..	..	—
Worcester City and County Banking Company	..	..	..	6
York City and County Banking Company	..	..	..	9
York Union Banking Company	..	..	..	8
Yorkshire Banking Company, Leeds	..	..	..	21
TOTAL				441

CHARTERED BANK :

Bank of England	..	..	..	..	..	11
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TOTAL Number of Branches of BANKS OF ISSUE 660

BANKS NOT OF ISSUE.

PRIVATE BANKS.

Alcock, J. J. & G., Burslem	..	..	..	..	—
Alnwick and County Bank	..	..	..	..	2
Alexanders, Cunliffe & Co., London	..	..	..	..	—
Ashby & Co., Staines	..	..	..	..	—
Baillie, Baillie & Co., Bristol	..	..	..	..	—
Barber & Co., London	..	..	..	..	—
Barclay, Bevan & Co., London	..	..	..	..	—
Barned & Co., Liverpool	..	..	..	..	—
Barnett, Hoare & Co., London	..	..	..	..	—
Biddulph, Cocks & Co., London	..	..	..	..	—
Biggerstaff, W. & J., London	..	..	..	..	1
Bolithos, Sons & Co., Penzance	..	..	..	..	3
Bosanquet & Co., London	..	..	..	..	—
Brooks & Co., London	..	..	..	..	—
Braginton, Rimington & Co., Torrington	..	..	..	..	—
Brown, Janson & Co., London	..	..	..	..	—
Brown & Co., J., London	..	..	..	..	—
Burgess, Canham & Co., Ramsgate	..	..	..	..	—

Names of Banks.					Number of Branches.
BANKS NOT OF ISSUE: Private Banks— <i>continued.</i>					
Call, Marten & Co., London	..	..	..	..	1
Carrick & Lee, Brampton	..	..	..	..	1
Cassons & Co., Port Madoc	..	..	..	..	2
Challis & Son, London	..	..	..	..	1
Chasemore & Robinson, Croydon	..	..	..	..	—
Child & Co., London	..	..	..	..	—
Cobb & Co., Margate	..	..	..	..	—
Cockburn & Co., London	..	..	..	..	—
Cooper & Purton, Bridgnorth	..	..	..	..	1
Coutts & Co., London	..	..	..	..	—
Cousins, Allen & Co., Leeds	..	..	..	..	—
Cunliffe, Son & Co., London	..	..	..	..	—
Cunliffes, Brooks & Co., Manchester	..	..	..	..	2
Cunliffes & Co., London	..	..	..	..	—
Curries & Co., London	..	..	..	..	—
Dale, Miller & Co., South Shields	..	..	..	..	—
Deane & Co., Winchester	..	..	..	..	—
Dickinson, J., Alston	..	..	..	..	—
Dimsdale, Drewett & Co., London	..	..	..	..	—
Dingley, Pearce & Co., Okehampton	..	..	..	..	1
Dingley, Pethybridge & Co., Loundeston	..	..	..	..	4
Dixons & Wardell, Chester	..	..	..	..	—
Downes, Groom & Hamilton, Nantwich	..	..	..	..	—
Drummond, Messrs., London	..	..	..	..	—
Feltham & Co., London	..	..	..	..	—
Fenton & Sons, Rochdale	..	..	..	..	1
Fincham, French & Simpson, Eye	..	..	..	..	—
Firth & Son, Northwich	..	..	..	..	—
Fisher, Johnson & Co., Cambridge	..	..	..	..	—
Footner & Son, Romsey	..	..	..	..	—
Fuller, Banbury & Co., London	..	..	..	..	—
Glyn, Mills & Co., London	..	..	..	..	—
Goslings & Sharpe, London	..	..	..	..	—
Grindlay & Co., London	..	..	..	..	—
Grant, Gillman & Long, Portsmouth	..	..	..	..	3
Green & Vittery, Brixham	..	..	..	..	—
Gruggen & Comper, Chichester	..	..	..	..	—
Gunner & Co., Bishops Waltham	..	..	..	..	—
Hallett, Ommanney & Co., London	..	..	..	..	—
Hanburys & Lloyds, London	..	..	..	..	—
Hardcastle & Co., Bolton	..	..	..	..	—

Names of Banks.					Number of Branches.
BANKS NOT OF ISSUE: Private Banks— <i>continued.</i>					
Harding & Co., Bideford	..	..	..	..	—
Harwood & Harwood, Clevedon	..	..	..	..	—
Hawkey, Whitford & Co., St. Columb	..	..	..	..	1
Head & Co., Carlisle	..	..	..	..	3
Head, G., East Grinstead	..	..	..	..	—
Henty & Co., Arundel	..	..	..	..	4
Herries, Farquhar & Co., London	..	..	..	..	—
Heywood Brothers & Co., Manchester	..	..	..	..	—
Heywood, Sons & Co., Liverpool	..	..	..	..	—
Hill & Sons, London	..	..	..	..	1
Hoare & Co., Charles, London	..	..	..	..	—
Hodgkin, Barnett & Co., Newcastle	..	..	..	..	2
Hopkinson & Co., C., London	..	..	..	..	—
Hughes & Joseph, Brecon	..	..	..	..	—
Jennings, Francis William, Leek	..	..	..	..	—
Kneeshaw, J. E., Liverpool	..	..	..	..	—
Lacy & Son, London	..	..	..	..	1
Lambton & Co., Newcastle	..	..	..	..	6
Leyland & Bullins, Liverpool	..	..	..	..	—
Martin & Co., London	..	..	..	..	—
Mackie, Davidson & Co., Carlisle	..	..	..	..	—
Mangles Brothers, Guildford	..	..	..	..	6
Moger, Son & Jones, Bath	..	..	..	..	—
Moilliett & Sons, Birmingham	..	..	..	..	—
Moss & Co., Liverpool	..	..	..	..	—
Nevile, Reid & Co., Windsor	..	..	..	..	—
Oldings, Osborne & Co., London	..	..	..	..	—
Parr & Co., Warrington	..	..	..	..	2
Parsons & Co., Presteign	..	..	..	..	—
Petty & Postlethwaite, Ulverston	..	..	..	..	—
Praeds & Co., London	..	..	..	..	—
Prescott, Grote & Co., London	..	..	..	..	—
Price, Marryat & Co., London	..	..	..	..	—
Puget, Bainbridge & Co., London	..	..	..	..	—
Pugh & Co., Pwllheli	..	..	..	..	—
Ransom, Bouverie & Co., London	..	..	..	..	—
Richards & Co., Llangollen	..	..	..	..	—

Names of Banks.	Number of Branches.
BANKS NOT OF ISSUE: Private Banks— <i>continued.</i>	
Richardson & Co., London	1
Robarts, Lubbock & Co., London	—
Robertson, Fraser & Co., Manchester	—
Robinson, James & George, & Co., Chesterfield ..	1
Robinson, John, Manchester	—
Roskell & Co., Preston	—
Samuel, E. L., Liverpool	—
Samuel, Montagu & Co., London	—
Saunders, Otley & Co., London	—
Saxton Brothers, Market Drayton	—
Scott & Co., Sir Samuel, London	—
Seale, Low & Co., London	—
Sewell & Nephew, Manchester	—
Shank, John, London	1
Shilson, Coode & Co., St. Austell	—
Shrubsole & Lambert, Kingston-on-Thames ..	—
Smith, Elder & Co., London	1
Smith, Payne & Smiths, London	—
Snead, Snead & Morgan, Brecon	—
Stevenson, Salt & Sons, London	—
Stoy & Co., Joseph, London	—
Stride, J. & W. S., London	1
Taylor & Son, James, Bakewell	—
Thurman & Co., Nottingham	—
Tugwell & Co., Bath	—
Twinings & Co., London	—
Undershell & Co., Oxford	—
Vivian & Co., Torquay	—
Ward, Merrimans & Co., Marlborough	—
Watts & Co., Newton Abbott	3
Webb & Co., Ledbury	—
Wheeler, R. & T., Wycombe	—
Williams & Co., Chester	2
Williams & Co., J. M., Redruth	—
Williams, Deacon & Co., London	—
Williams, P. & H. Wednesbury	—
Willis, Percival & Co., London	—
Willyams, Willyams & Co., St. Columb	—
Wilson & Son, Alfreton	—
Woodcock, Sons & Co., Wigan	—

Names of Banks.				Number of Branches.
BANKS NOT OF ISSUE: Private Banks— <i>continued</i> .				
Woods & Co., Newcastle-on-Tyne	..	..	..	5
Wright & Co., Nottingham	..	..	..	—
TOTAL				64

JOINT STOCK BANKS:

Adelphi Bank, Limited, Liverpool	..	..	..	2
Agra & Masterman's Bank, Limited, London	..	..	..	—
(This Bank has 1 Branch in Scotland and 9 Branches abroad.)				
Alliance of London and Liverpool Bank, Limited	..	..	..	4
Ashton, Stalybridge, Hyde and Glossop Bank	..	..	..	—
Bank of Bolton	..	..	..	—
Bank of Liverpool	..	..	..	—
Bank of London	..	..	..	1
Bank of Stockport	..	..	..	2
Bank of Wales, Limited, London	..	..	..	9
Birmingham Banking Company	..	..	..	2
Birmingham and Midland Bank	..	..	..	2
Birmingham Town and District Bank	..	..	..	—
Birmingham Joint Stock Bank, Limited	..	..	..	—
Bradford District Bank, Limited	..	..	..	—
Bradford Old Bank, Limited	..	..	..	—
Bucks and Oxon Union Bank, Aylesbury	..	..	..	8
Bury Banking Company	..	..	..	—
City Bank, London	..	..	..	1
Consolidated Bank, Limited, Manchester	..	..	..	1
Continental Bank Corporation, Limited, London	..	..	..	—
(This Bank has 1 Branch abroad.)				
Devon and Cornwall Banking Company, Plymouth	..	..	..	12
East London Bank, Limited	..	..	..	3
English and Irish Bank, Limited, London	..	..	..	—
(This Bank has a Branch in Ireland.)				
European Bank, Limited, London	..	..	..	—
(This Bank has 3 Branches abroad.)				
General London Bank, Limited	..	..	..	—
Glamorganshire Banking Company, Swansea	..	..	..	2

Names of Banks.	Number of Branches.
BANKS NOT OF ISSUE: Joint Stock Banks— <i>continued</i> .	
Hampshire Banking Company, Southampton	13
Imperial Bank, Limited, London	—
Leeds and County Bank, Limited	5
Liverpool Commercial Banking Company	—
Liverpool Union Bank	—
London and County Banking Company	127
London and Northern Bank, Limited	5
London and South Western Bank, Limited	13
London and Westminster Bank	7
London Bank of Scotland, Limited	3
(This Bank has also 3 Branches in Scotland.)	
London, Birmingham, and South Staffordshire Bank, Limited	3
London, Hamburg, and Continental Exchange Bank, Limited	—
(This Bank has 1 Branch abroad.)	
London Joint Stock Bank	1
Manchester and County Bank, Limited	5
Manchester and Liverpool District Bank	34
Manchester and Salford Bank	1
Mercantile and Exchange Bank, Limited, Liverpool	1
(This Bank has also a Branch in Scotland.)	
Merchant Banking Company, Limited, London	—
Metropolitan and Provincial Bank, Limited, London	4
Midland Banking Company, Limited, London	10
National Bank, London	2
National Bank of Liverpool	—
Portsmouth, Portsea, Gosport, and South Hants Banking Company	
Preston Banking Company	8
Royal Bank of Liverpool	—
Sheffield Union Banking Company	1
Staffordshire Joint Stock Bank, Limited, Bilston	4
Three Towns Loan and Banking Company, Limited, Stonehouse	—

Names of Banks.	Number of Branches.
BANKS NOT OF ISSUE: Joint Stock Banks— <i>continued</i> .	
Union Bank of London	3
Union Bank of Manchester, Limited	3
TOTAL	303
TOTAL Number of Branches of BANKS } NOT OF ISSUE	367

Inland Revenue Office, } *W. W. Dalbiac,*
 9th August, 1864. } Registrar of Bankers' Returns.

IRELAND.

RETURN of the Names of all BANKS carrying on Business in *Ireland* on the 1st day of June, 1864, with the Number of BRANCHES belonging to each; distinguishing Banks of Issue from Banks not of Issue, and Private Banks from Joint Stock Banks.

JOINT STOCK BANKS OF ISSUE.

1. The Bank of Ireland With 26 Branches (a Chartered Bank).
2. The Provincial " 43 "
3. The National " 51 "
4. The Belfast " 25 "
5. The Northern " 22 "
6. The Ulster " 24 "

JOINT STOCK BANKS NOT OF ISSUE.

7. The Royal With no Branches.
8. The Hibernian " 3 "
9. The English and Irish, Limited .. no "
10. The Union, Limited " 3 "

PRIVATE BANKS NOT OF ISSUE.

11. Messrs. Ball & Company With no Branches.
12. Messrs. Boyle, Low, Pim and Company .. " "
13. Messrs. Guinness, Mahon & Company .. " "
14. Messrs. David La Touche & Company .. " "

Inland Revenue, Stamps, Dublin, } *John S. Gairdner.*
 12 July, 1864. } Controller of Stamp Duties, Ireland.

SCOTLAND.

RETURN of the Names of all BANKS carrying on Business in Scotland on the 1st day of June, 1864, with the Number of BRANCH BANKS belonging to each; distinguishing Banks of Issue from Banks not of Issue, and Private Banks from Joint Stock Banks.

No.	NAME OF BANK.	Number of Branches.	Bank of Issue.	Bank not of Issue.	Private Bank.	Joint Stock Bank.
1	Aberdeen Town and County Banking Company	30	1	..	..	1
2	Bank of Scotland	44	1	..	..	1
3	British Linen Company ..	50	1	..	..	1
4	Caledonian Banking Company.. .. .	12	1	..	..	1
5	Central Bank of Scotland ..	9	1	..	..	1
6	City of Glasgow Bank ..	78	1	..	..	1
7	Clydesdale Banking Company.. .. .	48	1	..	..	1
8	Commercial Bank of Scotland	70	1	..	..	1
9	Dundee Banking Company . <i>Note.</i> — This Bank has amalgamated with the Royal Bank of Scotland since the taking out of the Licences on the 12th October, 1863.	4	1	..	..	1
10	National Bank of Scotland .	59	1	..	..	1
11	North of Scotland Banking Company	34	1	..	..	1
12	Royal Bank of Scotland ..	60	1	..	..	1
13	Union Bank of Scotland ..	96	1	..	..	1
	TOTAL ..	594	13	..	..	13

Inland Revenue, Edinburgh,
13 July, 1864.

A. Fletcher.

R R

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT OF THE PHYSICS DEPARTMENT
FOR THE YEAR 1911-12

CHICAGO, ILL., 1912

BY THE PHYSICS DEPARTMENT

CHICAGO, ILL., 1912

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CHICAGO, ILL., 1912

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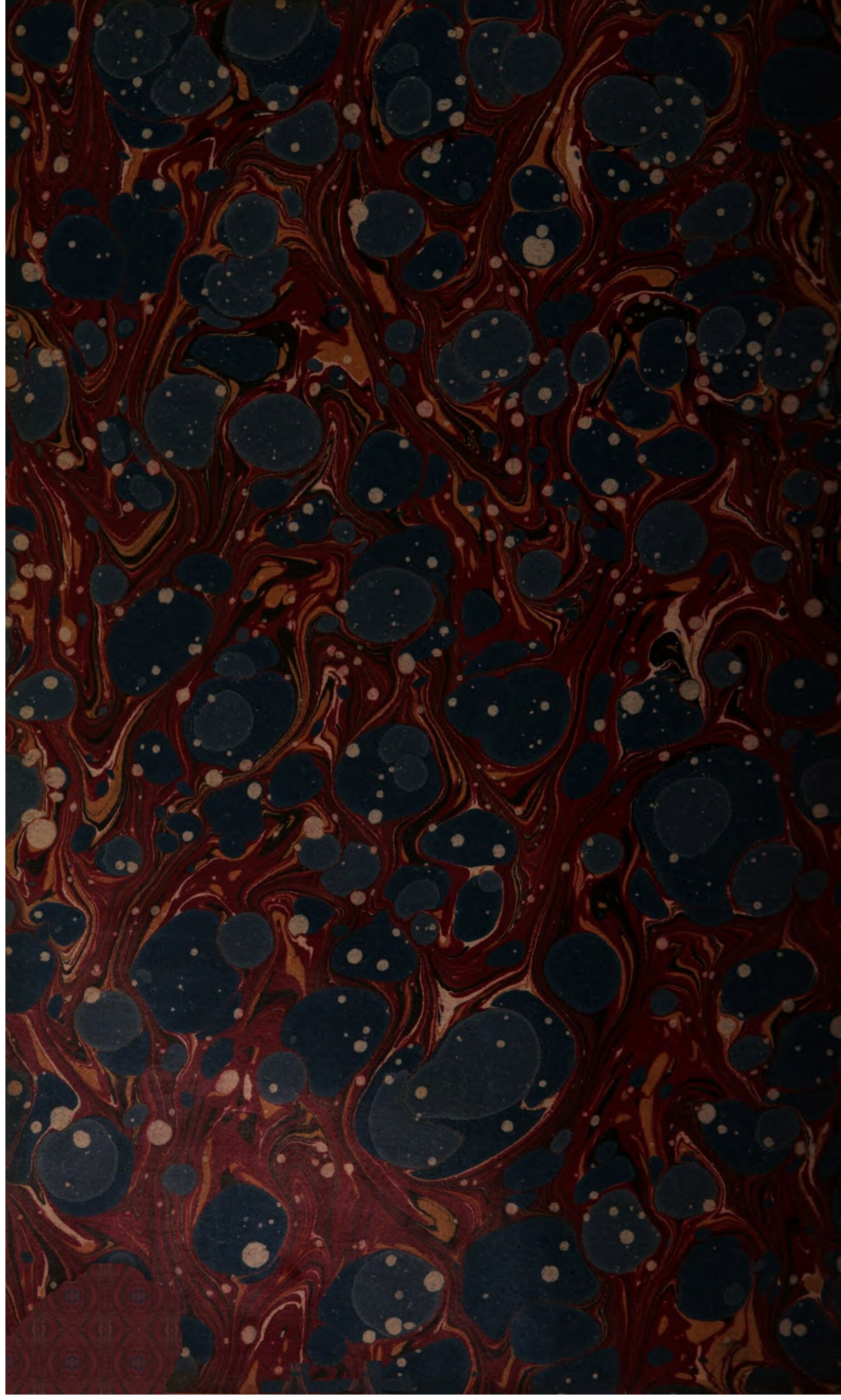
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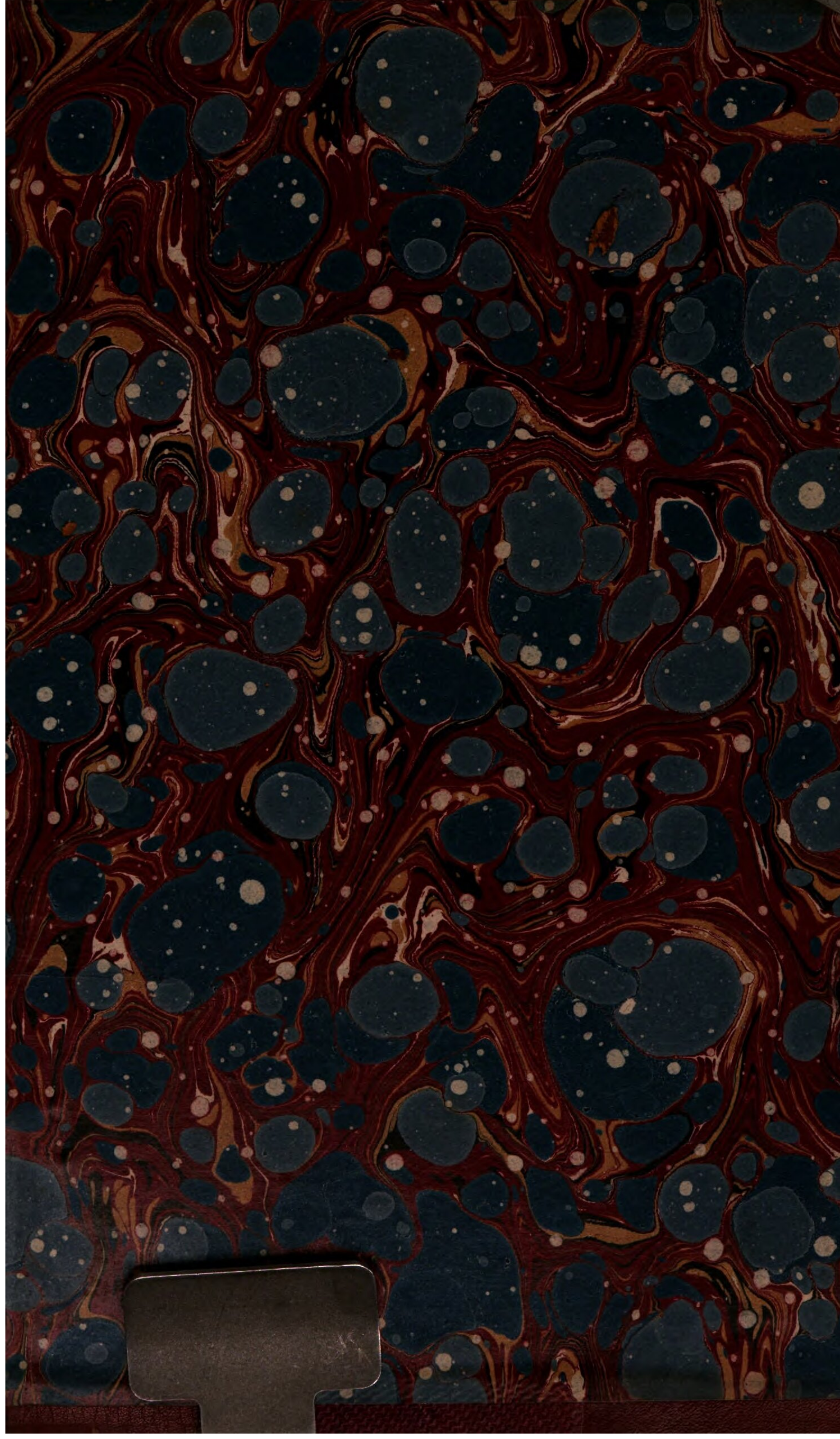
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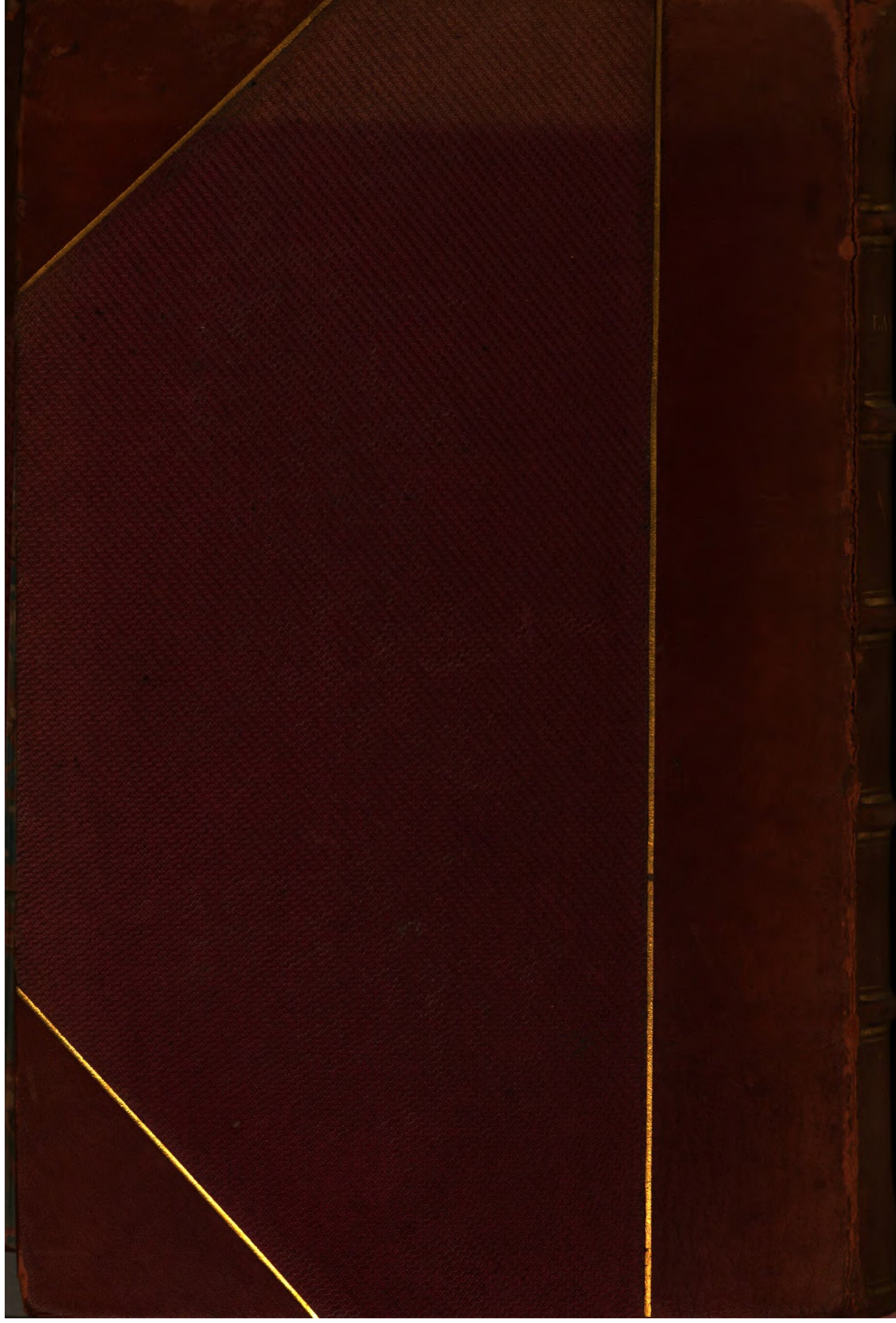
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